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Supreme Court of the United States

OCTOBER TERM, 1950

No. 20

JANE ROGERS, PETITIONER

vs.

THE UNITED STATES OF AMERICA

No. 21

IRVING BLAU, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1950.

CERTIORARI GRANTED MAY 15, 1950.

United States Court of Appeals

TENTH CIRCUIT.

No. 3768.

JANE ROGERS, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

No. 3769.

NANCY WERTHEIMER, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

No. 3770.

IRVING BLAU, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

No. 3782.

ARTHUR BARY, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

No. 3783.

PAUL MEIR KLEINBORD, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 18, 1948. (CASES NOS. 3768, 3769, 3770.)
FILED OCTOBER 19, 1948. (CASES NOS. 3782, 3783.)

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Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit, at the November Term, 1949, before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

On the 18th day of October, A. D. 1948, a transcript of the record, pursuant to notices of appeals (filed in the United States District Court for the District of Colorado) was filed in the office of the clerk of the United States Court of Appeals for the Tenth Circuit in certain causes wherein Jane Rogers and Irving Blau were appellants, and United States of America was appellee; and on the 19th day of October, A. D. 1948, a transcript of the record, pursuant to notices of appeals (filed in the United States District Court for the District of Colorado) was filed in the office of the clerk of the United States Court of Appeals for the Tenth Circuit in certain causes wherein Arthur Bary and Paul Meir Kleinbord were appellants, and United States of America was appellee; which said transcripts, as prepared and printed under the rules of the United States Court of Appeals for the Tenth Circuit, are in the words and figures following:

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 3768.

JANE ROGERS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

No. 3769.

NANCY WERTHEIMER, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

No. 3770.

IRVING BLAU, APPELLANT.

vs.

UNITED STATES OF AMERICA, APPELLEE.

Statement of Points. (Cases Nos. 3768 and 3769).

Come now the above entitled appellants and file the following Statement of Points upon which they will rely in the prosecution of their appeal herein.

1. The District Court erred and acted in excess of its jurisdiction in that it ordered said appellants confined upon an Order of Commitment, which fails to recite the facts constituting the contempt and does not contain the District Judge's certificate that he saw or heard the conduct constituting the contempt, and that it was committed in the actual presence of the Court.

2. The District Court erred and acted in excess of its jurisdiction in that it adjudged appellants guilty of contempt in violation of Title 18, U. S. C., Section 402, notwithstanding the fact that none of the contempts purportedly committed by appellants constitutes "also a criminal offense under any statute of the United States," as therein provided.

3. The District Court erred and acted in excess of its jurisdiction in that, in the event any contempt for which

appellants were adjudged and sentenced, does in fact and in law constitute contempt in violation of Title 18, U. S. C., Section 402, appellants were not tried therefor in conformity with Title 18, U. S. C., Section 3691 and Rule 42 (b) of the Federal Rules of Criminal Procedure.

4. The District Court erred and acted in excess of its jurisdiction and in violation of Article III, Section 2 and Amendment VII of the Constitution of the United States.

5. The District Court erred and acted in excess of its jurisdiction and in violation of Amendment I of the Constitution of the United States.

6. The District Court erred and acted in excess of its jurisdiction and in violation of Amendment V of the Constitution of the United States.

7. The District Court erred and acted in excess of its jurisdiction when it found the appellants guilty of contempt for failure to answer certain questions before the Grand Jury without requiring the government to indicate sufficiently the nature of the inquiry.

8. The District Court erred and acted in excess of its jurisdiction in adjudging and sentencing appellants for contempt by reason of their refusal to answer certain questions concerning their membership in or connection with the Communist Party in that said appellants declined to answer same on the ground said answers may tend to incriminate them in violation of their rights under the Constitution of the United States.

9. The proceeding in the court below is void in that said court did not accord appellants due process of law.

SAMUEL D. MENIN,
Attorney for Appellants, Jane Rogers and Nancy Wertheimer.

Received a copy of the above Statement of Points this 2nd day of November, 1948.

CLIFFORD C. CHITTIM, Assistant United States Attorney.

Filed November 2, 1948.

Statement of Points. (Case No. 3770).

Comes now the above entitled appellant and files the following Statement of Points upon which he will rely in the prosecution of his appeal herein.

1. The District Court erred and acted in excess of its jurisdiction in that it ordered said appellant confined upon an Order of Commitment, which fails to recite the facts constituting the contempt and does not contain the District Judge's certificate that he saw or heard the conduct constituting the contempt, and that it was committed in the actual presence of the Court.

2. The District Court erred and acted in excess of its jurisdiction in that it adjudged appellant guilty of contempt in violation of Title 18, U.S.C., Section 402, notwithstanding the fact that none of the contempts purportedly committed by appellant constitutes "also a criminal offense under any statute of the United States," as therein provided.

3. The District Court erred and acted in excess of its jurisdiction in that, in the event any contempt for which appellant was adjudged and sentenced, does in fact and in law constitute contempt in violation of Title 18, U. S. C., Sec.. 402, appellant was not tried therefor in conformity with Title 18, U. S. C., Sec. 3691 and Rule 42 (b) of the Federal Rules of Criminal Procedure.

4. The District Court erred and acted in excess of its jurisdiction and in violation of Article III, Section 2 and Amendment VII of the Constitution of the United States.

5. The District Court erred and acted in excess of its jurisdiction and in violation of Amendment I of the Constitution of the United States.

6. The District Court erred and acted in excess of its jurisdiction and in violation of Amendment V of the Constitution of the United States.

7. The District Court erred and acted in excess of its jurisdiction when it found the appellant guilty of contempt for failure to answer certain questions before the Grand Jury without requiring the government to indicate sufficiently the nature of the inquiry.

8. The District Court erred and acted in excess of its jurisdiction in adjudging and sentencing appellant for contempt by reason of appellant's refusal to answer certain questions concerning his wife which he was privileged not to answer by reason of the law of Colorado and the law applicable to Courts of the United States.

9. The District Court erred and acted in excess of its jurisdiction in adjudging and sentencing appellant for contempt by reason of his refusal to answer certain questions concerning his membership in or connection with the Communist Party in that said appellant declined to answer same on the ground said answers may tend to incriminate him in violation of his rights under the Constitution of the United States.

10. The District Court erred and exceeded its jurisdiction in that there never was any formal order from the court to appellant requiring appellant to answer any questions before the Grand Jury.

11. The proceeding in the court below is void in that said court did not accord appellant due process of law.

SAMUEL D. MENIN,
Attorney for Appellant,
Irving Blau.

Received a copy of the above Statement of Points this 2nd day of November, 1948.

CLIFFORD C. CHITTIM, Assistant
United States Attorney.

Filed November 2, 1948.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE J. FOSTER SYMES, JUDGE OF THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF COLORADO, PRESIDING IN THE FOLLOWING ENTITLED CAUSES:

In the Matter of the Grand Jury.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JANE ROGERS, DEFENDANT.

No. 11688.-Criminal.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

NANCY WERTHEIMER, DEFENDANT.

No. 11689.-Criminal.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

IRVING BLAU, DEFENDANT.

No. 11690.-Criminal.

Order Empanelling Grand Jury.

1 At this day, it is ordered by the Court that George O. Hodgson, one of the jurors aforesaid, be, and he is hereby, appointed to be foreman of the grand jury, and that Eudochia Bell Smith be, and she is hereby, appointed to be deputy foreman of the grand jury.

And thereupon, the said foreman and deputy foreman, and

the said grand jurors, to wit: Thomas William Alden, Felix Andrew, Ida Pearl Bloss, Dorothy Annette Dallemand, Chester A. DeGrofft, Orion W. Dickey, William John Donovan, Ralph J. Eaton, Carl O. Fragrelius, Fred D. Fouse, Harry Gude, Nettie Lucille Owens, Harry LaBonde, Harry M. Mayer, J. C. Morrison, Sadie Schultz, Logan Ray Scott, Carlos L. Smith, Roberta E. Timberlake and Walter W. Towne, are now duly sworn and empanelled as a grand jury, according to law, and instructed by the Court touching their duties, and retire to their room under charge of the Marshal to consider of their presentments and findings of the matters given to them in charge.

Entered on the Docket September 20, 1948.

Order Remanding Jane Rogers to Custody of U. S. Marshal.

2 This matter coming on for hearing in open court, The United States of America appearing by Max M. Bulkeley, District Attorney, and Max H. Goldschein, Special Assistant to the Attorney General, upon notice to this Court that Jane Rogers who was duly subpoenaed and appeared before the regularly empaneled and duly constituted Grand Jury on September 21, 1948, after testifying that she had been the Treasurer of the Communist Party of Denver until January, 1948, at which time she turned over the books and records to another person, when asked who she turned those books and records over to, refused to tell the Grand Jury, and in open court at this hearing, when the Court ordered the witness, Jane Rogers, to answer the question, Jane Rogers said she would refuse to do so, and it appearing to the Court that said Jane Rogers was obstructing the business of the Grand Jury in so refusing to answer the question and obey the order of this Court,

It Is, Therefore, Ordered, Adjudged and Decreed that the said Jane Rogers be committed to the custody of the United States Marshal and by him held until the further order of this Court.

Entered on the Docket September 21, 1948.

Order Remanding Jane Rogers to Custody of U. S. Marshal.

3 This matter coming on for hearing in open court, The United States of America appearing by Max M. Bulkeley, District Attorney, and Max H. Goldschein, Special Assistant to the Attorney General, and Jane Rogers, the defendant, appearing in person and by Samuel D. Menin, her attorney, at which time the defendant asked for permission to go before the Grand Jury to purge herself of contempt, and the Court having heard the arguments of counsel and being now fully advised in the premises,

It Is, Therefore, Ordered, Adjudged and Decreed that the said Jane Rogers be committed to the custody of the United States Marshal and by him taken before the Grand Jury to testify, and thereafter to be retained by him, to be returned into this Court on Thursday, September 23, 1948, at nine thirty o'clock a.m. for further proceedings.

Entered on the Docket September 22, 1948.

Order of Plea—No Bail Granted [Jane Rogers].

71 At this day comes Max H. Goldschein, Special Assistant to the Attorney General, Max M. Bulkeley, District Attorney, and Joseph N. Lilly, Assistant District Attorney, and the defendant is brought into court by the Marshal, and Samuel D. Menin, her attorney, also comes.

And thereupon, the defendant saith she will answer one question propounded to her, but refuses to answer further. Thereupon the Court finds the defendant guilty of violation of Sections 401-402, Title 18, U. S. C., and

It Is Ordered by the Court that judgment be entered herein and that the defendant be held without bail.

Entered on the Docket September 23, 1948.

[Judgment and Commitment as to Jane Rogers.]

72 On this twenty-third day of September, A. D., 1948, came the attorney for the government and the defendant appeared in person and by her counsel, Samuel D. Menin,

and It Is Adjudged that the defendant having been convicted for contempt, for disobedience of a lawful process, order, rule or command of the court at the present session of the duly empaneled grand jury, and again in open court, thereby obstructing the business of the grand jury and the due administration of justice, in violation of Title 18, U.S.C.A., Sections 401-2, and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) months from and after this twenty-third day of September, A. D. 1948.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

J. FOSTER SYMES,
United States District Judge.

Filed and Entered on the Docket September 23, 1948.

Notice of Appeal.

73 Name and address of appellant: Jane Rogers, 2934 West Holden Place, Denver, Colorado.

Name and address of appellant's attorney: Samuel D. Menin, 614 E & C Building, Denver, Colorado.

Offense: Contempt of Court, violation of Sections 401 and 402, Title 18, United States Code.

Concise statement of judgment or order: Court ordered appellant to be in the custody of the United States Attorney General to be confined in a place designated by him for a period of four months, on the 23rd day of September, 1948.

The above-named appellant, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated September 23, 1948.

SAMUEL D. MENIN,
Attorney for the Appellant.

Filed September 23, 1948.

[Order Denying Motion of Jane Rogers for Release upon Bond.]

74 At this day comes Max M. Bulkeley, District Attorney, and Joseph N. Lilly, Assistant District Attorney, and the defendant by Samuel D. Menin, her attorney, also comes.

And thereupon the attorney for the defendant moves the Court for the release of said defendant upon bond, which motion is hereby denied. To which ruling of the Court the defendant excepts.

Entered on the Docket September 24, 1948.

Certificate of Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado.

75 The undersigned hereby certifies, pursuant to the provisions of Title 28 U. S. C. 2245, that he is Judge of the United States District Court for the District of Colorado and that in said capacity and by the authority vested in him, did, on the 20th day of September, 1948, call and duly impanel a Grand Jury for the District of Colorado and caused the proper oath to be administered to the foreman, deputy foreman and members thereof.

That said Grand Jury immediately thereafter commenced their deliberations and were in proper session at all times mentioned herein.

That on the 21st day of September, 1948, the Court's attention was called to the fact that Jane Rogers, a witness duly

summoned before the Grand Jury, refused to answer questions proponuded to her by said Grand Jury, while under oath.

At a hearing held in open Court on said date, at which time the said Jane Rogers was present, she was interrogated regarding the questions she refused to answer before the Grand Jury. The questions which Jane Rogers refused to answer pertained to who had the books and records of the Communist Party at the present time and who Jane Rogers gave those books to in January of this year, which questions the said Jane Rogers refused to answer in open Court. The said Jane Rogers was ordered by the Court to answer those questions and in reply to an inquiry as to whether or not she would answer, she definitely stated "No." An excerpt of the transcript of said proceedings is attached hereto
76 as Exhibit "A."

In order that the said Jane Rogers might have an opportunity to reflect upon the matter and to consult with counsel, the Court remanded her to the custody of the United States Marshal for further hearing until 10:00 a.m. the following morning in order that she might have an opportunity to purge herself of the contempt.

On the morning of September 22, 1948, in open Court, the Court was informed by Mr. Samuel D. Menin, Counsel for Jane Rogers, that she would purge herself of her contempt by answering the questions. She was ordered by the Court to return to the Grand Jury room and if she purged herself of the contempt, she would be released. An excerpt of the transcript of said proceedings is attached hereto as Exhibit "B."

On the morning of September 23, 1948, in open Court, the Court's attention was called to the fact that the said Jane Rogers had again been brought before the Grand Jury, would answer only one question and refused to answer all others. Whereupon, the Court found her guilty of contempt and sentenced her to the custody of the Attorney General for four months. An excerpt of the transcript of said proceedings is attached hereto as Exhibit "C."

A verbatim report of the Grand Jury is attached hereto

as Exhibit "D," which reflects the degree to which the refusal of the witnesses to testify had obstructed the work of said Grand Jury in the administration of justice.

The undersigned presided at the trial of the cause herein and the matters set out in this Certificate occurred in his presence.

Dated at Denver, Colorado, this 28th day of September, 1948.

J. Foster Symes, Judge of the United States District Court for the District of Colorado.

Exhibit A.

Excerpts from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge had in Open Court on September 21, 1948.

77 (Page 1) The Court: This is in the matter of the Grand Jury. Has the Government something to present to the Court:

Mr. Goldschein: Yes, may it please your Honor. The Grand Jury in session subpoenaed before it a witness by the name of Mrs. Jane Rogers. Mrs. Rogers was asked certain questions pertaining to an inquiry before this Grand Jury. One of the questions was whether or not she ever had in her possession any of the books and records of the Communist Party and Mrs. Rogers answered that she did up until January of 1948. As treasurer of that Communist Party of Denver, she had in her possession the list of moneys collected for dues as dues of the membership, together with other records. She was asked whether or not she had those records at the present time and she said she did not have them. And she was asked who did have them, she said that she wouldn't tell us.

The Court: Was she under oath?

Mr. Goldschein: She was under oath, duly sworn and testified to a great many—admitted that she was treasurer of the Communist Party of Denver for several years and testified to a great many other matters before the Grand Jury that were pertinent to the issue.

The Court: What is this woman's name?

Mr. Goldschein: Mrs. Jane Rogers.

(Page 2) The Court: Is she in court?

Mr. Goldschein: She is, yes, sir.

The Court: Is Mrs. Rogers here?

Mrs. Jane Rogers: Yes.

* * * * *

The Court: Now, what is the question?

Mr. Goldschein: Who has the books and records of the Communist Party of Denver now. Who did Mrs. Rogers give those books up to as she says she gave them up in January of this year.

The Court: Do you care to answer that question, madam?

Mrs. Rogers: I do not.

The Court: What?

Mrs. Rogers: I do not, and that's what I told them.

The Court: Why won't you answer?

Mrs. Rogers: I don't feel that I should subject a person or persons to the same thing that I'm going through.

78 (Page 3) The Court: It is the order or finding of the Court that you should answer those questions. Now, will you do that?

Mrs. Rogers: No.

The Court: Then the Court will commit you to the custody of the marshal to be held until further order. Court stands adjourned.

* * * * *

The Court: You will be detained until tomorrow morning until ten o'clock. In the meantime, you may consult counsel and have a hearing tomorrow morning at ten o'clock on your reasons for refusal to answer questions.

Mrs. Rogers: I can consult counsel between now and then?

The Court: Yes, but you will be in the custody of the

marshal all the time. Get your counsel and bring him over here if you want to, but you will have to be in the custody of the marshal and spend the night in jail, I'm afraid.

* * * * *

Exhibit B.

Excerpts from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge Had in Open Court on September 22, 1948.

79 (Page 11) * * *

Mr. Menin: As to the witness Jane Rogers, I think she will purge herself of her contempt by answering the questions.

The Court: In the case of the witness Rogers, then, the order of the Court is that she return to the Grand Jury room and if she purges herself of contempt, then upon bringing the matter back to the Court, she will be discharged. In the meantime, she will remain in custody.

* * * * *

Exhibit C.

Excerpts from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge Had in Open Court on September 23, 1948.

80 (Page 38) * * *

Mr. Goldschein: Mrs. Jane Rogers.

The Court: Is she here?

Mr. Goldschein: She is here, yes, sir. Now, may it please Your Honor—

The Court: Step over here, madam: What is the status of her case?

Mr. Goldschein: Mrs. Rogers refuses to answer the questions propounded to *here* in the grand jury room. She was brought back on yesterday, but says that she will answer one question but will not answer any others, and was advised that it would be necessary for her to answer all questions propounded except those which would incriminate her for

the violation of a federal offense, and she says she won't answer any.

The Court: Is that your position, madam?

Mr. Menin: I think there has been a misunderstanding.

The Court: Just a minute. Will you please be seated, Mr. Menin? Please be seated.

Mr. Menin: Well, I represent this lady.

The Court: Just a moment. Please be seated.

Mr. Menin: Very well.

(Page 39) The Court: I'll hear you in due course. Madam, do you still persist in not answering these questions?

Mrs. Rogers: Well, on the basis of Mr. Menin's statements this morning—

The Court: Will you please answer the question yes or no?

Mrs. Rogers: Well, I think that's rather undemocratic. I'm a very honest person. Would you mind letting me consider—

The Court: Make any statement you wish.

Mrs. Rogers: Well, as I said before, I'm a very honest person and I'm not acquainted with the tricks of legal procedure, but I understand from the reading of these cases this morning that I am—and I do have a right to refuse to answer these questions, on the basis that they would tend to incriminate me, and you read it yourself, that I have the right to decide that.

The Court: You have not the right to say.

Mrs. Rogers: According to what you read, I do. I stand on that.

The Court: All right. If you will make no changes, it is the judgment and sentence of the court you be confined to the custody of the Attorney General for four months. Call the next case.

* * * * *

Exhibit D.

Excerpt from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge Had in Open Court on September 24, 1948.

81 (Page 2) The Court: Has the Government something ready in relation to the Grand Jury?

Mr. Goldschein: Yes, may it please your Honor. I have been assisting Mr. Bulkeley, the United States Attorney, working with his assistants, Mr. Lilly and Mr. Nevans, in presenting and assisting the Grand Jury in making investigation of certain violations of the Federal law in this district. In connection with that investigation, the Grand Jury has requested that I direct the Court's attention to the fact that certain witnesses who have been subpoenaed to appear before the Grand Jury and have appeared have wilfully and deliberately obstructed the business of that Grand Jury and hindered in obstructing them from finishing their investigation; that they are recessing today and will convene at some future date for the continuation of the business of the Grand Jury in this District. At that time they hope that they will be in a position to have these witnesses, namely, Jane Rogers, Nancy Wertheimer, Arthur Bary, Paul Kleinbord, Tracy Rogers, and Irving Blau to come again before the Grand Jury and make answer to such questions as are propounded to them that the Court directed them they must answer; that they have up to date refused to answer; and until that time, such time as they do answer those questions, the Grand Jury is unable to continue its investigation along the lines that they were going.

The Court: Is that correct, Mr. Foreman?

The Foreman: Yes, sir, your Honor, it is correct.

Mr. Goldschein: The entire Grand Jury, of course, was present at the investigation of these matters and they are all in Court now with the Foreman.

The Court: The Foreman has spoken for them.

Mr. Goldschein: Yes, sir. I just thought the record might show that they are all here in the presence of the Court.

The Court: Is that all you have?

Mr. Goldschein: That's all except those other matters; that's all so far as the Grand Jury is concerned.

The Court: Ladies and gentlemen of the Grand Jury, you may retire and continue your deliberations. You may go now.

(Whereupon the Grand Jury retired from the court room.)

• • • • •

Filed September 29, 1948.

[Statement of Docket Entries as to Jane Rogers.]

1.	Grand Jury empanelled, and session commences	Sep. 20, 1948
2.	Hearing—Order remanding Jane Rogers to Custody of U. S. Marshal	Sept. 21, 1948
3.	Hearing—Order remanding Jane Rogers to custody of U. S. Marshal	Sep. 23, 1948
4.	Reporter's transcript of court proceedings had on Sep. 21, 1948	Sep. 23, 1948
5.	Reporter's transcript of court proceedings had on Sep. 22, 1948	Sep. 23, 1948
6.	Hearing—Judgment: 4 months custody of Attorney General	Sep. 23, 1948
7.	Order: No bail granted	Sep. 23, 1948
8.	Notice of Appeal by Defendant	Sep. 23, 1948
9.	Certified copies of remand order transmitted to U. S. Marshal	Sep. 24, 1948
10.	Grand Jury reports into court—roll call, all present—Recesses to Wednesday, September 29, 1948, at 9:30 A.M.	Sep. 24, 1948
11.	Order: On defts request for release on bond denied	Sep. 24, 1948
12.	Marshal's return remand—executed 9/21/48 County Jail, Denver	Sep. 27, 1948

13. Certificate of Hon. J. Foster Symes, Judge of the U. S. Dist. Court for the Dist. of Colo. Sep. 29, 1948

Order Remanding Nancy Wertheimer to Custody of U. S. Marshal.

87 This cause coming on to be heard this 21st day of September, 1948, the United States of America appearing by Max M. Bulkeley, District Attorney, and Max H. Goldschein, Special Assistant to the Attorney General, upon notice and hearing in open court, and it appearing to the Court that Nancy Wertheimer, a duly subpoenaed witness before the regularly empaneled and duly constituted Grand Jury on the 21st day of September, 1948, appeared before the Grand Jury and when asked certain questions with reference to any official position that she held with the Communist Party of Denver, Miss Wertheimer stated that she refused to answer any question pertaining to the Communist Party, whereupon she was directed by the Court to answer the question, and Miss Nancy Wertheimer stated that she would not do so, and

It appearing to the Court that Miss Nancy Wertheimer was obstructing the business of the Grand Jury in so refusing to answer the question and obey the order of this Court;

It Is, Therefore, Ordered, Adjudged, and Decreed that the said Miss Nancy Wertheimer be committed to the custody of the United States Marshal and by him held until the further order of the Court.

Entered on the Docket September 21, 1948.

Order Remanding Nancy Wertheimer to Custody of U. S. Marshal.

88 This matter coming on to be heard this 22nd day of September, 1948, The United States of America appearing by Max M. Bulkeley, District Attorney, and Max H. Goldschein, Special Assistant to the Attorney General, and the defendant, Nancy Wertheimer, appearing in person

and by Samuel D. Menin, her attorney, states that she still refuses to answer the questions submitted to her before the Grand Jury and in open court, and the Court having heard the arguments of counsel and being now fully advised in the premises;

It Is, Therefore, Ordered, Adjudged and Decreed that the said Nancy Wertheimer be committed to the custody of the United States Marshal and by him held until the further order of this Court.

Entered on the Docket September 22, 1948.

Order of Plea—No Bail Granted. [Nancy Wertheimer.]

89 At this day comes Max H. Goldschein, Special Assistant to the Attorney Generel, Max M. Bulkeley, District Attorney, and Joseph N. Lilly, Assistant District Attorney, and the defendant is brought into court by the Marshal, and Samuel D. Menin, her attorney, also comes.

And thereupon the defendant refuses to answer the questions propounded to her. Thereupon the Court finds the defendant guilty of violation of Sections 401-402, Title 18, U. S. C., and

It Is Ordered by the Court that judgment be entered herein and that the defendant be held without bail.

Entered on the Docket September 23, 1948.

[Judgment and Commitment as to Nancy Wertheimer.]

90 On this twenty-third day of September, A. D. 1948, came the attorney for the government and the defendant appeared in person and by her counsel, Samuel D. Menin, and

It Is Adjudged that the defendant having been convicted for contempt, for disobedience of a lawful process, order, rule or command of the court at the present session of the duly empaneled grand jury, and again in open court, thereby obstructing the business of the grand jury and the due administration of justice, in violation of Title 18, U. S. C. A., Sections 401-2, and the court having asked the defendant whether she has anything to say why judgment should not

be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) months from and after this twenty-third day of September, A. D. 1948.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

J. FOSTER SYMES,
United States District Judge.

Filed and Entered on the Docket September 23, 1948.

Notice of Appeal.

92 Name and address of appellant: Nancy Wertheimer, 2638 Champa Street, Denver, Colorado.

Name and address of appellant's attorney: Samuel D. Menin, 614 E & C Building, Denver, Colorado.

Offense: Contempt of Court, violation of Sections 401 and 402, Title 18, United States Code.

Concise statement of judgment or order: Court ordered appellant to be in the custody of the United States Attorney General to be confined in a place designated by him for a period of four months, on the 23rd day of September, 1948.

The above-named appellant, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated September 23, 1948.

SAMUEL D. MENIN,
Attorney for the Appellant.

Filed September 23, 1948.

[Order Denying Motion of Nancy Wertheimer for Release upon Bond.]

93 At this day comes Max M. Bulkeley, District Attorney, and Joseph N. Lilly, Assistant District Attorney, and the defendant by Samuel D. Menin, her attorney, also comes.

And thereupon the attorney for the defendant moves the Court for the release of said defendant upon bond, which motion is hereby denied. To which ruling of the Court the defendant excepts.

Entered on the Docket September 24, 1948.

Certificate of Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado.

94 The undersigned hereby certifies, pursuant to the provisions of Title 28 U. S. C. 2245, that he is Judge of the United States District Court for the District of Colorado and that in said capacity and by the authority vested in him, did on the 20th day of September, 1948, call and duly impanel a Grand Jury for the District of Colorado and caused the proper oath to be administered to the Foreman, Deputy Foreman and members thereof.

That said Grand Jury immediately thereafter commenced their deliberations and were in proper session at all times mentioned herein.

That on the 21st day of September, 1948, the Court's attention was called to the fact that Nancy Wertheimer, a witness duly summoned before the Grand Jury, refused to answer questions propounded to her by said Grand Jury, while under oath.

At a hearing held in open Court on said date, at which time the said Nancy Wertheimer was present, she was interrogated regarding the questions she refused to answer before the Grand Jury. The questions which Nancy Wertheimer refused to answer pertained to whether or not she was a member of the Communist Party, whether or not she held any official position with the Communist Party, and a general

refusal to answer any other questions pertaining to the Communist Party. The Court ordered the said Nancy Wertheimer to answer the questions, which she refused to do. An excerpt of the transcript of said proceedings is attached
95 hereto as Exhibit "A."

In order that the said Nancy Wertheimer might have an opportunity to reflect upon the matter and to consult with counsel, the Court remanded her to the custody of the United States Marshal for further hearing until 10:00 a.m. the following morning in order that she might have an opportunity to purge herself of the contempt.

On the morning of September 22, 1948, in open Court, the Court was informed that Nancy Wertheimer's position was the same as the previous day, and it was, therefore, ordered that she remain in custody. An excerpt of the transcript of said proceedings is attached hereto as Exhibit "B."

On the morning of September 23, 1948, in open Court, the said Nancy Wertheimer's position was the same as the previous day, in that she persisted in refusing to answer the questions. Whereupon, the Court found her guilty of contempt and sentenced her to the custody of the Attorney General for four months. An excerpt of the transcript of said proceedings is attached hereto as Exhibit "C."

A verbatim report of the Grand Jury is attached hereto as Exhibit "D," which reflects the degree to which the refusal of the witnesses to testify had obstructed the work of said Grand Jury in the administration of Justice.

The undersigned presided at the trial of the cause herein and the matters set out in this Certificate occurred in his presence.

Dated at Denver, Colorado, this 29th day of September, 1948.

J. FOSTER SYMES, Judge of the United States
District Court for the District of Colorado.

Exhibit A.

Excerpts from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge, Had in Open Court on September 21, 1948.

* * * * *

96 (Page 24) Mr. Goldschein: We have another witness, your Honor.

The Court: Is it the same thing?

Mr. Goldschein: Same thing.

The Court: What is her name?

Mr. Goldschein: Miss Wertheimer.

The Court: Where is she? Stand up, madam. What do you say about her?

Mr. Goldschein: Miss Nancy Wertheimer refused to answer any questions before the Grand Jury. She refused to tell us whether or not she was a member of the Communist Party, whether or not she has held any official position with the Communist Party, or refused to answer any other questions pertaining to the Communist Party. I would like to ask the Court to direct—

The Court: Do you persist in that, madam?

Miss Wertheimer: Yes, sir. May I state my basis?

The Court: Certainly.

* * * * *

(Page 26) The Court: It is the opinion of the Court that you should answer them and the Court orders you to answer them or else stand committed and be here tomorrow morning at ten o'clock. In the meantime you will be committed to the custody of the United States Marshal.

Miss Wertheimer: Well, I would prefer—

The Court: If you make up your mind that you want to answer the questions, you can go back to the Grand Jury and do so.

Miss Wertheimer: No, sir, I do not wish to.

The Court: You won't do that?

Miss Wertheimer: No, sir.

The Court: Very well; same order. You will be in the custody of the Marshal until tomorrow morning. In the meantime, you can consult your lawyer, and be here at ten o'clock. All right.

Exhibit B.

Excerpts from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge Had in Open Court on September 22, 1948.

97 (Page 11) * * *

The Court: * * * In regard to—who is the other woman?

Mr. Menin: Now, we—

(Page 12) The Court: Miss Wertheimer. Just a minute.

Mr. Menin: Very well.

The Court: In regard to Miss Wertheimer, we are informed now by her counsel that she stands exactly as she did yesterday and has no desire or will not purge herself of the contempt which the Court found her guilty of yesterday. Therefore, she will stay in custody of the Court until such time as the Court calls the matter up for sentence of further disposition.

* * * * *

Exhibit C.

Excerpts from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge Had in Open Court on September 23, 1948.

98 (Page 39) * * *

Mr. Goldschein: Miss Wertheimer, Nancy Wertheimer.

The Court: Will you come forward, madam? What is her situation?

Mr. Goldschein: Miss Wertheimer assumes the same attitude that she did on yesterday before the Court. She refuses to answer any questions before the grand jury.

(Page 40) The Court: Is that true, madam?

Miss Wertheimer: Yes, sir.

The Court: Do you persist in that? You don't want to change your testimony?

Miss Wertheimer: Under the circumstances I have no *wich* to change my stand on this.

* * * * *

(Page 42) The Court: * * * Madam, as I understand it, you still refuse to answer these questions?

Miss Wertheimer: Yes, sir. May I make a statement?

The Court: Certainly.

Miss Wertheimer: I feel that this is a star chamber method, the methods that were used in Hitler Germany. You haven't been willing to grant Mr. Menin, as my counsel, the right to read anything into the records; you haven't granted any of the so called defendants here, who have not done anything against the interests of the United States, the right to defend themselves as they should be defended, and I feel this is something that's got to be gotten out of the system of the United States, this kind of procedure.

The Court: If that's all you have to say, it is the judgment and sentence of the Court that you serve four months in the custody of the Attorney General. That's all.

* * * * *

Exhibit D.

Excerpts from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge Had in Open Court on September 24, 1948.

99 (Page 2) The Court: Has the Government something ready in relation to the Grand Jury?

Mr. Goldschein: Yes, may it please your Honor. I have been assisting Mr. Bulkeley, the United States Attorney, working with his assistants, Mr. Lilly and Mr. Nevans, in presenting and assisting the Grand Jury in making investi-

gation of certain violations of the Federal law in this district. In connection with that investigation, the Grand Jury has requested that I direct the Court's attention to the fact that cerain witnesses who have been subpoenaed to appear before that Grand Jury and have appeared have wilfully and deliberately obstructed the business of that Grand Jury and hindered in obstructing them from finishing their investigation; that they are recessing today and will convene at some future date for the continuation of the business of the Grand Jury in this District. At that time they hope that they will be in a position to have these witnesses, namely, Jane Rogers, Nancy Wertheimer, Arthur Bary, Paul Kleinbord, Tracy Rogers, and Irving Blau to come again before the Grand Jury and make answer to such questions as are propounded to them that the Court directed them they must answer; that they have up to date refused to answer; and until that time, such time as they do answer those questions, the Grand Jury is unable to continue its investigation along the lines that they were going.

The Court: Is that correct, Mr. Foreman?

(Page 3) The Foreman: Yes, sir, your Honor, it is correct.

Mr. Goldschein: The entire Grand Jury, of course, was present at the investigation of these matters and they are all in Court now with the Foreman.

The Court: The Foreman has spoken for them.

Mr. Goldschein: Yes, sir. I just thought the record might show that they are all here in the presence of the Court.

The Court: Is that all you have?

Mr. Goldschein: That's all except those other matters; that's all so far as the Grand Jury is concerned.

The Court: Ladies and gentlemen of the Grand Jury, you may retire and continue your deliberations. You may go now.

(Whereupon the Grand Jury retired from the court room.)

* * * * *

Filed September 29, 1948.

[Statement of Docket Entries as to Nancy Wertheimer.]

1.	Grand Jury empanelled, and session commences	Sep. 20, 1948
2.	Hearing—Order remanding Nancy Wertheimer to custody of U. S. Marshal	Sep. 21, 1948
3.	Hearing—Order remaning Nancy Wertheimer to custody of U. S. Marshal	Sep. 22, 1948
4.	Reporter's transcript of court proceedings had on September 21, 1948	Sep. 23, 1948
5.	Reporter's transcript of court proceedings had on September 22, 1948	Sep. 23, 1948
6.	Hearing—Judgment: 4 months custody of Attorney General	Sep. 23, 1948
7.	Order: No bail granted	Sep. 23, 1948
8.	Notice of Appeal by the Defendant	Sep. 23, 1948
9.	Certified copies of remand orders of September 22 and 23, 1948, to U. S. Marshal	Sep. 24, 1948
10.	Grand jury—Reports into Court—roll call, all present—recessed to Wednesday, September 29, 1948, at 9:30 A.M.	Sep. 24, 1948
11.	Order: On defendants request for release on bond denied	Sep. 24, 1948
12.	Marshal's return—Remand executed 9/21/48 County Jail, Denver	Sep. 27, 1948
13.	Certificate of Hon. J. Foster Symes, Judge of the District Court for the District of Colorado	Sep. 29, 1948

Order of Plea—No Bail Granted. [Irving Blau.]

102 At this day comes Max H. Goldschein, Special Assistant to the Attorney General, Max M. Bulkeley, District Attorney, and Joseph N. Lilly, Assistant District Attorney, and the defendant is brought into court by the Marshal, and Samuel D. Menin, his attorney, also comes.

Thereupon the defendant refuses to answer the questions

propounded to him. Thereupon the Court finds the defendant guilty of violation of Sections 401-402, Title 18, U. S. C., and

It Is Ordered by the Court that judgment be entered herein and that the defendant be held without bail.

Entered on the Docket September 23, 1948.

[Judgment and Commitment as to Irving Blau.]

103 On this twenty-third day of September, A. D., 1948, came the attorney for the government and the defendant appeared in person and by his counsel, Samuel D. Menin, and

It Is Adjudged that the defendant having been convicted for contempt, for disobedience of a lawful process, order, rule or command of the court at the present session of the duly empaneled grand jury, and again in open court, thereby obstructing the business of the grand jury and the due administration of justice, in violation of Title 18, U. S. C. A., Sections 401-2, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months from and after this twenty-third day of September, A. D. 1948.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

J. Foster Symes,
United States District Judge.

Filed and Entered on the Docket, September 23, 1948.

Notice of Appeal.

104 Name and address of appellant: Irving Blau, 3225 East 38th Avenue, Denver, Colorado.

Name and address of appellant's attorney: Samuel D. Menin, 614 E & C Building, Denver, Colorado.

Offense: Contempt of Court, violation of Sections 401 and 402, Title 18, United States Code.

Concise statement of judgment or order: Court ordered appellant to be in the custody of the United States Attorney General to be confined in a place designated by him for a period of six months, on the 23rd day of September, 1948.

The above-named appellant, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated September 23, 1948.

SAMUEL D. MENIN.

Filed September 23, 1948.

Certificate of Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado.

105 The undersigned hereby certifies, pursuant to the provisions of Title 28 U. S. C. 2245, that he is Judge of the United States District Court for the District of Colorado and that in said capacity and by the authority vested in him, did, on the 20th day of September, 1948, call and duly impanel a Grand Jury for the District of Colorado and caused the proper oath to be administered to the Foreman, Deputy Foreman and members thereof.

That said Grand Jury immediately therafter commenced their deliberations and were in proper session at all times mentioned herein.

That on the 23d day of September, 1948, the Court's attention was called to the fact that Irving Blau, a witness duly summoned before the Grand Jury, refused to answer questions propounded to him by said Grand Jury, while under oath.

At a hearing held in open Court on said date, at which time the said Irving Blau was present with counsel, he was interrogated regarding the questions he refused to answer before the Grand Jury. Said questions pertained to the present whereabouts of his wife, Patricia Blau, whether or not he held any official connection with the Communist Party and other questions. An excerpt of the transcript of said proceedings is attached hereto as Exhibit "A."

The Court offered the said Irving Blau an opportunity to appear before the Grand Jury again and purge himself of the contempt, which Irving Blau refused.

106 The said Irving Blau was afforded an opportunity to consult with Mr. Samuel D. Menin, his counsel, and after stating that he did not desire to change his answers, the Court found him guilty of contempt and sentenced him to the custody of the Attorney General for six months, as is shown by Exhibit "A" hereto attached.

A verbatim report of the Grand Jury is attached hereto as Exhibit "B", which reflects the degree to which the refusal of the witness to testify had obstructed the work of said Grand Jury in the administration of justice.

The undersigned presided at the trial of the cause herein and the matters set out in this Certificate occurred in his presence.

Dated at Denver, Colorado, this 28th day of September, 1948.

J. Foster Symes, Judge of the United States District Court for the District of Colorado.

Exhibit A.

Excerpt from Transcript of Proceedings before the Honorable J. Foster Symes, United States District Judge Had in Open Court on September 23, 1948.

107 (Page 2) The Court: What have we this morning?

Mr. Goldschein: May it please Your Honor, we have this morning another witness before the grand jury who refuses to answer questions of the grand jury, a witness by the name

of Irving Blau who was duly subpoenaed and sworn as a witness and answered certain questions before the grand jury but refused to answer others, among which is the whereabouts of his wife who is subpoenaed as a witness before the grand jury.

The Court: You mean a subpoena is out for her?

Mr. Goldschein: A subpoena is out. The witness has been notified that his wife, Patricia Blau, is subpoenaed as a witness and when asked before the grand jury where his wife is at the present time refuses to answer, in substance saying, "That's your problem. If you find her I'm sure she will be glad to appear as a witness; but since she's my wife the law protects me from disclosing to you where she is."

* * * * *

(Page 4) Mr. Blau: I'd like to have a copy of this transcript so I may follow it.

The Court: You're not entitled to it. Just be seated. I'll let it be read and you listen to it and if you want to correct anything, let it be read again.

* * * * *

Mr. Goldschein: Yes, sir. On page 35 the question is asked Irving Blau as follows: "Does your wife hold any position in the Communist Party of Denver, sir?—A. I do not desire to answer that question.

"Q. Sir?—A. I don't desire to answer that question. I don't feel I am required to answer that question. I feel that that knowledge is based upon a privileged communication under the laws of the State of Colorado."

* * * * *

(Page 5) "Q. Do you have any official connection with the Communist Party?—A. I don't desire to answer that question.

"Q. Do you hold any office with the Communist Party?—A. I don't desire to answer that question on the ground that it might tend to incriminate me."

* * * * *

Mr. Goldschein: "Q. Do you have any official connection

with the Communist Party?—A. I don't desire to answer that question on the ground that it might tend to incriminate me.

108 (Page 6) Mr. Goldschein: (Con't) "Q. Sir?—A. I don't desire to answer that question on the ground that it may tend to incriminate me.

"Q. Do you hold any office, any official position with the Communist Party?—A. I don't—for the same reason, I don't desire to answer that question.

(Page 7) "Q. Have you ever held any position with the Communist Party?"

Page 37.

"A. I don't desire, for the same reason, to answer that question.

"Q. Did you ever collect any dues from the members of the Communist Party?—A. For the same reason, I don't desire to answer that question.

"Q. Did you ever assist in the calling of the membership of the Communist Party of Denver for a meeting of any kind?—A. For the same reason, I don't desire to answer that question."

* * * * *

Mr. Goldschein: "Now, Mr. Blau, where is Mrs. Blau now?—A. My knowledge of her whereabouts at present is based on a privileged communication, as I understand it, under the laws of Colorado and therefore I don't intend to reveal it."

(Page 8) "Q. Is that a secret too?—A. I think I've made my answer very clear.

"Q. Is she away on business.—A. I don't desire to answer any question regarding her presence, where she is at present.

"Q. How long has she been gone?—A. I think I will have to give you the same answer on that.

"Q. Is she out of the city?—A. Same answer.

"Q. Same answer to what?—A. Her present location is a matter of privileged communication.

"Q. What do you mean by privileged communication?—A. Well, a privileged communication, to my understanding, is a communication between a man and his wife."

109 (Page 8) Mr. Goldschein: (Cont'd.)

Page 40.

"Q. Mr. Blau, this grand jury requests the presence of your wife as a witness here and up till now you have been concealing her whereabouts and obstructing the grand jury from serving a subpoena, having a subpoena served on her. Are you going to persist in that?—A. My answer is that her whereabouts—my knowledge of her whereabouts is based on a communication which I understand is privileged under the laws of the State of Colorado, and I also understand under the federal law.

• • • • •

(Page 9) "Q. That's right.—A. I'd like to consult an attorney on that.

"Q. All right. You know where she is though?—A. Yes, I do."

Page 54.

"Q. Mr. Blau, are you prepared to tell us where Mrs. Blau is at the present time?—A. No, I am not."

• • • • •

(Page 10) The Court: Mr. Blau, did you hear this reading?

Mr. Blau: Yes, sir.

The Court: Is that correct?

Mr. Blau: Yes, sir.

The Court: The answers that you made thereto are correct, are they?

Mr. Blau: Yes, sir.

The Court: All right. Do you want to change your mind?

Mr. Goldschein: On page —

(Page 11) The Court: I beg your pardon?

Mr. Goldschein: I have some further that I would like to read. This is yesterday's proceedings. Page 124.

• • • • •

"Q. Are you fearful that your wife may be involved in

a criminal action of some sort?—A. No, sir, I am not. If you can serve her with a subpoena I'm sure she will be glad to come and testify, just as I have.

"Q. Now, where do you suggest that we serve her with that subpoena?—A. I would suggest that that was your problem.

110 (Page 12) Mr. Goldschein: (Cont'd.)

"Q. You refuse to tell us?—A. Yes.

"Q. You, of course, know where she is?—A. I have answered that I do.

"Q. So to put your mind at rest on any reservation that you might have, I am advising you now that the only purpose of this grand jury wants your wife for is as a witness and for no other purpose. Do you still refuse to tell us where she can be served with process?—A. Yes, sir, I do. I would also like to add this, as I did before: If you can serve her I'm sure she would have no objection to come here as I did, voluntarily, after I was served to testify.

* * * * *

The Court: And you don't care to change your answers?

Mr. Blau: Not if my understanding of the law is correct, sir.

The Court: I mean I'll give you an opportunity, if you want to go back before the grand jury and answer these questions. Do you want to avail yourself of that privilege?

(Page 15) The Court: What you are being asked is not for a privileged communication; you are just asked where this woman is so that the Government can call her as a witness.

Mr. Blau: My knowledge of her whereabouts is based on a privileged communication.

The Court: What?

Mr. Blau: My knowledge, or my understanding is that my knowledge is based on a privileged communication between her and me.

(Page 16) The Court: Every communication between a husband and wife is not privileged; it is only when it might result in their conviction for a crime.

Mr. Blau: Well, sir, I think that is the position of this grand jury, among others.

The Court: Let's get back to the question. Do you stand by these answers, and you have no desire to change your testimony on any of these answers you have made?

Mr. Blau: Assuming that my understanding of the law is correct, I think for the present I must say yes.

* * * * *

111 (Page 34) The Court: No, you cannot. I will give him an opportunity to change his testimony later. As I have stated before, in order to conduct the courts and prosecute people who violate crimes, it is necessary under the Constitution of the United States that an indictment be returned on them before they can be tried here. Now, I don't know what matter the grand jury is investigating and concerning which this witness was called, but he can't set himself up and say a question would tend to incriminate himself just because he believes that himself.

* * * * *

(Page 35) So the Court finds that the defendant is guilty of violating Sections 401 and 402 of Title 18 of the United States Code Annotated, and unless the witness decides to change his testimony and answer these questions freely and without any further question, the Court will not pronounce sentence. Do you desire to make any change?

Mr. Blau: May I have a few minutes to consult with my counsel at this time?

The Court: What?

Mr. Blau: I request a few moments to consult with my counsel.

The Court: Step outside and come back in five minutes.

(Whereupon Mr. Blau and his counsel, Mr. Menin, left the court room.)

Mr. Menin: If the Court pleases, I have just received some very pertinent cases.

(Page 36) The Court: Where is the defendant?

Mr. Menin: He is still consulting with one of his friends out there.

The Court: Tell him to come back in Court. Bring him in Court, Mr. Marshal.

Mr. Menin: I'll get him.

(Mr. Blau enters the court room.)

The Court: Will you step up here to the bar of the court?

Mr. Menin: May I, for the purpose of the record—

The Court: No, just wait a minute until the Court finishes. What is your name?

Mr. Blau: Irving S. Blau.

The Court: How old are you?

Mr. Blau: 34, sir.

The Court: Where were you born?

Mr. Blau: *Younkers*, New York.

The Court: The Court having found you guilty of contempt and in violation of the laws of the United States, it is the sentence and judgment of the Court that you serve a term of six months in jail and be committed to the custody of the Attorney General.

* * * * *

Exhibit B.

Excerpt From Transcript of Proceedings Before The Honorable J. Foster Symes, United States District Judge Had in Open Court on September 24, 1948.

112 (Page 2) The Court: Has the Government something ready in relation to the Grand Jury?

Mr. Goldschein: Yes, may it please your Honor. I have been assisting Mr. Bulkeley, the United States Attorney, working with his assistants, Mr. Lilly and Mr. Nevans, in presenting and assisting the Grand Jury in making investigation of certain violations of the Federal law in this district.

In connection with that investigation, the Grand Jury has requested that I direct the Court's attention to the fact that certain witnesses who have been subpoenaed to appear before the Grand Jury and have appeared have wilfully and deliberately obstructed the business of that Grand Jury and hindered in obstructing them from finishing their investigation; that they are recessing today and will convene at some future date for the continuation of the business of the Grand Jury in this District. At that time they hope that they will be in a position to have these witnesses, namely, Jane Rogers, Nancy Wertheimer, Arthur Bary, Paul Kleinbord, Tracy Rogers, and Irving Blau to come again before the Grand Jury and make answer to such questions as are propounded to them that the Court directed them they must answer; that they have up to date refused to answer; and until that time, such time as they do answer those questions, the Grand Jury is unable to continue its investigation along the lines that they were going.

The Court: Is that correct, Mr. Foreman?

(Page 3) The Foreman: Yes, sir, your Honor, it is correct.

Mr. Goldschein: The entire Grand Jury, of course, was present at the investigation of these matters and they are all in Court now with the Foreman.

The Court: The Foreman has spoken for them.

Mr. Goldschein: Yes, sir. I just thought the record might show that they are all here in the presence of the Court.

The Court: Is that all you have?

Mr. Goldschein: That's all except those other matters; that's all so far as the Grand Jury is concerned.

The Court: Ladies and gentlemen of the Grand Jury, you may retire and continue your deliberations. You may go now.

(Whereupon the Grand Jury retired from the court room.)

* * * * *

Filed September 29, 1948.

[Statement of Docket Entries as to Irving Blau.]

1.	Grand Jury empanelled and session commences	Sep. 20, 1948
2.	Hearing in Court on contempt	Sep. 23, 1948
3.	Judgment: 6 months custody of Attorney General	Sep. 23, 1948
4.	Order: No bail be granted	Sep. 23, 1948
5.	Notice of Appeal of Defendant	Sep. 23, 1948
6.	Grand Jury reports into court—roll call, all present—Recessed to Wednesday, September 29, 1948, at 9:30 A.M.	Sep. 24, 1948
7.	Certificate of Hon. J. Foster Symes, Judge of the U. S. Dist. Court for the Dist. of Colo.	Sep. 29, 1948

114 Clerk's Note: On October 11th, 1948, the Grand Jury was recessed, and the jurors were excused, subject to call at a later date.

Stipulation.

86 It is hereby stipulated and agreed by and between Samuel D. Menin, counsel for Jane Rogers, Nancy Wertheimer and Irving Blau, and Max *Buckeley*, United States attorney, that the above entitled matters may be tried on a single record in the United States Court of Appeals. It is further stipulated and agreed by and between counsel for the respective parties, that the above entitled matters may be combined for the purpose of presentation to the United States Court of Appeals.

SAMUEL D. MENIN, Attorney for Jane Rogers, Nancy Wertheimer and Irving Blau.
MAX M. BULKELEY, Attorney for the United States of America.

Filed October 6, 1948.

Proceedings, September 21, 1948.

4 Before: The Honorable J. Foster Symes, U. S. District Judge. In Open Court.

Present: Mr. Max Goldschein, Special Assistant to the United States Attorney General; Mr. E. E. Nevans, Assistant United States District Attorney; Mr. Joseph N. Lilly, Assistant United States District Attorney; Mrs. Jane Rogers; Miss Nancy Wertheimer.

5 (The following proceedings were had in open court before the Honorable J. Foster Symes, United States District Judge, at 11:55 a.m., September 21, 1948.)

The Court: This is in the matter of the Grand Jury. Has the Government something to present to the Court?

Mr. Goldschein: Yes, may it please your Honor. The Grand Jury in session subpoenaed before it a witness by the name of Mrs. Jane Rogers. Mrs. Rogers was asked certain questions pertaining to an inquiry before this Grand Jury. One of the questions was whether or not she ever had in her possession any of the books and records of the Communist Party and Mrs. Rogers answered that she did up until January of 1948. As treasurer of that Communist Party of Denver, she had in her possession the list of moneys collected for dues as dues of the membership, together with other records. She was asked whether or not she had those records at the present time and she said she did not have them. And she asked who did have them, she said that she wouldn't tell us.

The Court: Was she under oath?

Mr. Goldschein: She was under oath, duly sworn and testified to a great many—admitted that she was treasurer of the Communist Party of Denver for several years and testified to a great many other matters before the Grand Jury that were pertinent to the issue.

The Court: What is this woman's name?

Mr. Goldschein: Mrs. Jane Rogers.

6 The Court: Is she in court?

Mr. Goldschein: She is, yes, sir.

The Court: Is Mrs. Rogers here?

Mrs. Jane Rogers: Yes.

The Court: Stand up, madam. Is this true what they say, what the record shows?

Mrs. Rogers: Well, he didn't quite—I mean, I didn't say—

The Court: Just come around here where I can hear you.

Mrs. Rogers: I mean he says that I testified that I was treasurer for a number of years and actually it was about a year that—well, let's see—yes, about a year that I was treasurer, and as I told him, I couldn't tell him the exact dates because I didn't have my check books with me.

The Court: Now, what is the question?

Mr. Goldsclein: Who has the books and records of the Communist Party of Denver now. Who did Mrs. Rogers give those books up to as she says she gave them up in January of this year.

The Court: Do you care to answer that question, madam?

Mrs. Rogers: I do not.

The Court: What?

Mrs. Rogers: I do not, and that's what I told them.

The Court: Why won't you answer?

Mrs. Rogers: I don't feel that I should subject a person or persons to the same thing that I'm going through.

The Court: It is the order or finding of the Court that you should answer those questions. Now, will you do that?

Mrs. Rogers: No.

The Court: Then the Court will commit you to the custody of the marshal to be held until further order. Court stands adjourned.

Mrs. Rogers: I have three children, sir, and they have to be taken care of.

The Court: Just a minute, madam. Where are your children?

Mrs. Rogers: They're at home. Well, two of them—one of them is in school right now and the other one is in a nursery and the baby is at home. It so happens the father is home today.

The Court: Can't he look after them?

Mrs. Rogers: Well, I mean—I don't know.

The Court: You can phone him.

Mrs. Rogers: What?

The Court: Can you telephone him?

Mrs. Rogers: Certainly I can phone him. I already did and told him I didn't know how long I would be detained, but according to your order I can be detained indefinitely.

The Court: You will be detained until tomorrow morning until ten o'clock. In the meantime, you may consult counsel and have a hearing tomorrow morning at ten o'clock on your reasons for refusal to answer questions.

Mrs. Rogers: I can consult counsel between now and then?

The Court: Yes, but you will be in the custody of the marshal all the time. Get your counsel and bring him over here if you want to, but you will have to be in the custody of the marshal and spend the night in jail, I'm afraid.

Mr. Goldschein: We have another witness, your Honor.

The Court: Is it the same thing?

Mr. Goldschein: Same thing.

The Court: What is her name?

Mr. Goldschein: Miss Wertheimer.

The Court: Where is she? Stand up, madam. What do you say about her?

Mr. Goldschein: Miss Nancy Wertheimer refused to answer any questions before the Grand Jury. She refused to

tell us whether or not she was a member of the Communist Party, whether or not she has held any official position with the Communist Party, or refused to answer any other questions pertaining to the Communist Party. I would like to ask the Court to direct—

The Court: Do you persist in that, madam?

Miss Wertheimer: Yes, sir. May I state my basis?

The Court: Certainly.

Miss Wertheimer: I feel that according to my Constitutional rights there are some things which are my private property, and these things concern my political views. Now, the first and the fifth amendments which I was told I would be read here in this court room—

9 The Court: What?

Miss Wertheimer: The first and the fifth amendments to the Constitution, I feel that I am within my rights in not testifying against myself or stating any of these things that he has asked me. Also, I would like to know—if I am called as a witness to the Grand Jury I'll go and I'll testify if I know what I'm testifying for.

The Court: Of course, anything you testify to, unless you signed a waiver, can't be used against you in any trial hereafter. That's the law, isn't it?

Mr. Goldschein: We advised Miss Wertheimer, may it please the Court, that she can refuse to answer any question that she believes may involve her in the commission of a Federal offense. Other than that, she is compelled to answer every question propounded to her, but she can't determine what is material or immaterial—the Court will answer that question.

The Court: If you answer any questions up there, madam, they cannot be used against you in any trial in this court or any other to convict you in any way. Do you understand that?

Miss Wertheimer: Theoretically I do, but I don't believe that is being held true today in the way the Grand Jury has functioned up until now, and on that basis, sir, I feel that I would be incriminating myself in something I had not done,

in violation of any Federal law, state or city laws,
10 and on those grounds I feel that unless I can be represented by counsel in court and I am not indicted on any charge, that I should not have to answer these questions.

The Court: It is the opinion of the Court that you should answer them and the Court orders you to answer them or else stand committed and be here tomorrow morning at ten o'clock. In the meantime, you will be committed to the custody of the United States Marshal.

Miss Wertheimer: Well, I would prefer—

The Court: If you make up your mind that you want to answer the questions, you can go back to the Grand Jury and do so.

Miss Wertheimer: No, sir, I do not wish to.

The Court: You won't do that?

Miss Wertheimer: No, sir.

The Court: Very well; same order. You will be in the custody of the Marshal until tomorrow morning. In the meantime, you can consult your lawyer, and be here at ten o'clock. All right.

11 Filed September 23, 1948.

Proceedings, September 22, 1948.

Before: The Honorable J. Foster Symes, United States District Judge. In Open Court.

12 Present: Mr. Max H. Goldchein, Special Assistant to the United States Attorney General; Mr. E. E. Nevans, Assistant United States District Attorney; Mr. Joseph N. Lilly, Assistant United States District Attorney; Mr. Max M. Bulkeley, United States District Attorney Mr. Samuel Menin appearing on behalf of: Miss Nancy Wertheimer and Mrs. Jane Rogers.

13 The Court: We will continue this matter of contempt of certain witnesses before the Grand Jury. Has the Government anything to add?

Mr. Goldschein: Nothing to add, may it please the Court, other than the witnesses have not been back before the Grand Jury or requested to come back.

Mr. Menin: If the Court please, I desire to enter my appearance on behalf of the witnesses.

The Court: Just a minute. You can enter your appearance. I don't know whether you're entitled to counsel or not, but I'll be very glad to hear anything you have to say.

Mr. Menin: Very well. In regard to the witness Rogers, I've read the transcript of what has transpired in court here yesterday; and I believe that upon my advice she will answer questions which were propounded to her.

Regarding the witness Nancy Wertheimer, I believe that's it, after considerable thought on the matter she feels that the answer to the question which was propounded to her would tend to incriminate her.

The Court: Which question do you mean? There are several.

Mr. Menin: The question, the only question apparently, according to that record, is as to whether or not she is a member of the Communist Party or whether or not she is a Communist. Her reasoning on that matter—and I think it isn't without legal justification— is that in New York recently twelve persons were indicted. I have seen
14 the indictment. They charge that the twelve were advocating the belief of Marx and Lenin and consequently are advocating revolutionary ideas and advocating the overthrow of the Government. If those indictments can be made, can be sustained, then it appears that the membership in the Communist Party which *arries* with it a belief in the doctrines of Marx and Lenin, would then become a criminal act; and in view of the law as it now stands and in view of the fact that the Grand Jury in New York has indicted people for such beliefs, the witness Nancy Wertheimer feels that to be compelled to answer a ques-

tion which would tend to indicate a belief in the doctrines of Marx and Lenin is to compel her to violate her Constitutional rights by compelling her to answer a question which would incriminate her.

The Court: I think you're wrong in that. Those indictments in New York are not for contempt of court; they are for failure to answer questions before a Congressional committee. It is an entirely different factual situation than we have here.

Mr. Menin: No. May I show, enlighten the Court on that? There are different indictments in New York. One group of indictments were for the mere belief in the doctrines of Marx and Menin—or Lenin.

Mr. Goldschein: May it please the Court, may I interrupt for just a moment? I don't do this generally, but counsel is going so far afield that I think the Court ought to be enlightened as to what counsel means by what he says.

15 Mr. Menin: Now, if you will let me do that.

The Court: Let him finish his argument, then you can answer it.

Mr. Menin: In New York the indictment was solely a belief in the doctrines of Marx and Lenin, and a consequent conclusion by the Grand Jury that a belief in those doctrines constitutes an advocacy of the overthrow of the Government of the United States.

The Court: Are you sure of your facts on that?

Mr. Menin: I saw the indictments. Now, in view—and I can obtain them, I think, within a reasonable time. I would have to wire to New York to get them, but I can obtain them within a reasonable time.

Now, if that is correct, then the answer of the question, "Are you a member of the Communist Party?"—if the answer were in the affirmative would necessarily indicate that the person who had answered those questions believes in the doctrines of Marx and Lenin. Therefore, it is a conclusion of that witness—and I say, therefore, not without

legal justification—that if she were to answer that question she would subject herself to a possible indictment for a belief in doctrines which the Government now considers amounts to a doctrine to overthrow the Government, and thus she would be incriminating herself by being compelled to answer that question.

16 The Court: You claim she has a right to decide whether the question would incriminate her or not?

Mr. Menin: I claim—

The Court: And it isn't up to the Court?

Mr. Menin: I claim that the witness is the only person who can determine whether or not a question in her judgment would tend to incriminate her.

The Court: You're the only one to believe that. The courts have held uniformly otherwise, that the witnesses cannot decide themselves what they shall answer and what they shall not. That is a question for the Court.

Mr. Menin: All right, but if the courts now, or if the Grand Juries throughout the country are indicting people for a belief in the doctrines of Marx and Lenin—

The Court: They are not doing that. I think you're wrong.

Mr. Menin: That's what has been done in New York.

The Court: I don't think so. I think you're wrong.

Mr. Menin: If the Court would care to continue the matter until I can obtain copies of the indictment, I think I can convince the Court on that point.

The Court: Let me hear what Mr. Goldschein has.

17 Mr. Goldschein: Of course, as your Honor suggested, that's not true. As a matter of fact, categorically everything that Mr. Menin said didn't seem to be based on fact. He didn't look into the question; he's merely guessing. Nobody in this court has ever been indicted or prosecuted for what they believe. Under the Smith Act, it is a violation of the law to advocate the overthrow of the Government by force. That hasn't anything to do, may it

please your Honor, with what anybody believes, whether he believes in Lenin or Marx or even Hitler or Mussolini. The sole question under that statute is whether or not they believe in the overthrow of the Government by force, and do some overt act in furtherance of it. This Grand Jury is not interested in what the political beliefs of these witnesses who came before the Grand Jury are; they are not interested in who they believe in or what their political philosophy is; they are interested in whether or not these particular witnesses hold an office in the Communist Party and whether or not they have in their possession any books or records which show a matter of interest to this Grand Jury, a matter under inquiry for a violation of a Federal statute—not a theory, a belief or a politicalism.

These witnesses, as Mr. Menin told your Honor, want to decide for themselves whether or not they shall answer questions before the Grand Jury here, whether they can simply say they refuse to answer and let it stop at that, or whether or not this Court is bound by it. Of course, as your Honor has pointed out to Mr. Menin, the Court will decide whether or not the answer to the question asked the witness, if the witness answers it, may tend to incriminate them for the violation of a Federal offense.

Now, witnesses are entitled to a hearing on that question and, of course, I am satisfied that your Honor will decide it.

Mr. Menin: If the Court please, counsel denies categorically the statements I have made and in the next breath makes a statement which I think proves the statements that I have made. He stated that under the Smith Act the advocacy of the overthrow of the Government becomes a crime. We agree that that—

The Court: No; by force.

Mr. Menin: All right, overthrow by force becomes a crime.

The Court: Where in this record does that question appear at all?

Mr. Menin: Just a second and I'll show the Court where

it does. In New York twelve people were indicted under the Smith Act and the charges in the indictment say that they have been on certain dates advocated the overthrow of the Government by the advocacy of the doctrines of Marx and Lenin, which are the doctrines of the Communist Party.

19 The Court: Just a minute. There is nothing in the record so far to the effect that these defendants advocate the doctrines of Marx and Lenin or anybody else; and there is nothing in the question which calls upon them to answer whether they advocate the overthrow of the Government by force or not. This is simply a proceeding by a Grand Jury, which is an arm of this court, and they refused to answer certain questions, and a good many of those questions have nothing to do really with the question of Communism or whether they believe in Communism or are an officer or member of any Communistic Party, so I don't care to hear any more on that.

Mr. Menin: As to the witness Rogers, we have agreed that she should answer those questions. Now, as to the other matter, I think—

The Court: Point out in this record what question you think she has a right to sustain an objection to.

Mr. Menin: As to the other matter—

The Court: Have you a copy there of the proceedings?

Mr. Menin: Yes, I have.

The Court: What page?

Mr. Menin: "The Court—"

The Court: What page?

Mr. Menin: "Mr. Goldschein—"; that's on page 24. "We have another witness, your Honor."

The Court: Wait a minute. All right.

20 Mr. Menin: "Mr. Goldschein: Miss Nancy Wertheimer refused to answer any questions before the Grand Jury."

Now, that's a general statement which I don't think would

be borne out by the facts, but the following may indicate what the situation is:

"She refused to tell us whether or not she was a member of the Communist Party, whether or not she has held any official position with the Communist Party, or refused to answer any other questions pertaining to the Communist Party. I would like to ask the Court to direct—

"The Court: Do you persist in that, madam?

"Miss Wertheimer: Yes, sir. May I state my basis?

"The Court: Certainly.

"Miss Wertheimer: I feel that according to my Constitutional rights there are some things which are my private property, and these things concern my political views. Now, the first and the fifth amendments which I was told I would be read here in this court room—

"The Court: What?

"Miss Wertheimer: The first and the fifth amendments to the Constitution, I feel that I am within my rights in not testifying against myself or stating any of these things that he has asked me. Also, I would like to know—if I am called as a witness to the Grand Jury I'll go and I'll testify if I know what I'm testifying for.

21 "The Court: Of course, anything you testify to, unless you signed a waiver, can't be used against you in any trial hereafter. That's the law, isn't it?

"Mr. Goldschein: We advised Miss Wertheimer, may it please the Court, that she can refuse to answer any question that she believes may involve her."

Now, Mr. Goldschein made this statement in court and he put it up to the witness to determine whether it would involve her in further proceedings.

Of course, at this time he makes no statement which he believes would involve her in the commission of a Federal offense.

"Other than that, she is compelled to answer every question propounded to her, but she can't determine what is

material or immaterial—The Court will answer that question."

Now, here are the questions that were propounded to her, and I think this Court should take judicial notice of the fact that a belief—or, a member of the Communist Party must by necessity, by the very nature of the Communist Party, be a believer in the doctrines of Marx and Lenin.

The Court: I don't know any such thing and I take no notice of that. You may know that, but I don't.

Mr. Menin: Well, then, we are *are* prepared to offer evidence that a member in the Communist Party believes in the doctrines of Marx and Lenin and, therefore, the answer to the question of whether she is or is not a Communist would then tend to incriminate her in view of the fact that indictments were returned in New York for the mere belief in the doctrines of Marx and Lenin.

22 The Court: We are not governed by those indictments in New York, are we?

Mr. Menin: No, but the witness has a right to judge from what occurs throughout the country as to whether or not—

The Court: I have plenty of authority here that holds that the witness cannot decide for himself whether or not he shall answer a question or whether it will be contemptuous to do so. It's for the Court to say.

Mr. Menin: Then, we must stand, if the Court please, on the witnesses' refusal to answer as to the witness Nancy Wertheimer.

The Court: All right.

Mr. Menin: As to the witness Jane Rogers, I think she will purge herself of her contempt by answering the questions.

The Court: In the case of the witness Rogers, then, the order of the Court is that she return to the Grand Jury room and if she purges herself of contempt, then upon bringing the matter back to the Court, she will be discharged. In the meantime, she will remain in custody.

In regard to—who is the other woman?—

Mr. Menin: Now, we—

23 The Court: Miss Wertheimer. Just a minute.

Mr. Menin: Very well.

The Court: In regard to Miss Wertheimer, we are informed now by her counsel that she stands exactly as she did yesterday and has no desire or will not purge herself of the contempt which the Court found her guilty of yesterday. Therefore, she will stay in custody of the Court until such time as the Court calls the matter up for sentence or further disposition.

Mr. Menin: Could we ask the Court to make some disposition so that this witness can be released on bond and an appeal taken for the determination?

The Court: I don't think you have a right to a bond.

Mr. Menin: We have a right to an appeal.

The Court: I don't know of any appeal myself. If you can find any authority for it, bring it in.

Mr. Menin: If this Court has wrongfully held this witness in contempt, we certainly have a right to have a higher court determine that issue.

The Court: There is a certain procedure you will have to look up. I can't advise you on that, Mr. Menin.

If there is nothing more, then, that will be all in this matter.

Filed September 23, 1948.

Proceedings, September 23, 1948.

Before The Honorable J. Foster Symes, United States District Judge. In Open Court.

Present: Mr. Max Goldschein, Special Assistant to the United States Atorney General; Mr. E. E. Nevans, Assis-

tant United States District Attorney; Mr. Samuel Menin, appearing on behalf of: Mrs. Jane Rogers, Miss Nancy Wertheimer, Mr. Arthur Bary, Mr. Irving Blau.

26 The Court: What have we this morning?

Mr. Goldschein: May it please Your Honor, we have this morning another witness before the grand jury who refuses to answer questions of the grand jury, a witness by the name of Irving Blau who was duly subpoenaed and sworn as a witness and answered certain questions before the Grand Jury but refused to answer others, among which is the whereabouts of his wife, who is subpoenaed as a witness before the grand jury.

The Court: You mean a subpoena is out for her?

Mr. Goldschein: A subpoena is out. The witness has been notified that his wife, Patricia Blau, is subpoenaed as a witness and when asked before the grand jury where his wife is at the present time refuses to answer, in substance saying, "That's your problem. If you find her I'm sure she will be glad to appear as a witness; but since she's my wife the law protects me from disclosing to you where she is."

Now I would like to read the pertinent part of his testimony before the grand jury.

The Court: Is he here?

Mr. Goldschein: Yes, sir, he is here.

The Court: Come forward and sit with your counsel.

Mr. Blau: Yes, sir.

Mr. Goldschein: I have the original copy—

The Court: Read the transcript.

Mr. Goldschein: The Court may have it to refer to.

27 The Court: What page?

Mr. Goldschein: Beginning, may it please Your Honor, on page 35.

Mr. Menin: If the Court please, it seems to me that the

witness is put at a disadvantage. I don't have a copy and they have refused to let me see the testimony of what the complaint is about.

The Court: Listen to this testimony and if it isn't correct you can take it up. You don't need a copy.

Mr. Menin: Before I argue this matter I should have a copy of it.

The Court: You are not entitled to counsel. Please proceed.

Mr. Menin: Let the record show the Court indicates that the witness is not entitled to counsel at this stage of the proceeding.

The Court: What?

Mr. Menin: As I understand you--

The Court: I said I didn't think he was, but I said I would allow you to appear for them if you want to.

Mr. Menin: I am appearing for him, and as his counsel I demand the right to see what testimony is being complained of so that I may intelligently be able to defend him in this proceeding this morning.

28 The Court: You can listen to the record as it is read. That's the reason I'm having it read, so you can tell what it's about.

Mr. Blau: I'd like to have a copy of this transcript so I may follow it.

The Court: You're not entitled to it. Just be seated. I'll let it be read and you listen to it and if you want to correct anything, let it be read again.

Mr. Menin: Let the record show the Court has ruled we are not entitled to a copy of the proceeding upon which these proceedings are being heard at this time.

The Court: The Court holds that it isn't necessary. The record is to be read and you can listen and make any corrections in it or objetcions as you may be advised. Now please proceed.

Mr. Goldschein: May it please the Court, I refuse to let the defendant or his counsel see it.

The Court: Go ahead. The Court has passed on it. Please read what you were going to.

Mr. Goldschein: Yes, sir. On page 35 the question is asked Irving Blau as follows: "Does your wife hold any position in the Communist Party of Denver, sir?

"A. I do not desire to answer that question.

"Q. Sir?—A. I don't desire to answer that question. I don't feel I am required to answer that question. I feel that that knowledge is based upon a privileged communication under the laws of the State of Colorado."

29 Page 36:

"Q. You are not afraid that it may involve you in the commission of any offense against the United States Government, are you?—A. Possibly.

"Q. Possibly what?—A. My answer is, I do not desire to answer that question.

"Q. Do you have any official connection with the Communist Party?—A. I don't desire to answer that question.

"Q. Do you hold any office with the Communist Party?—A. I don't desire to answer that question on the ground that is might tend to incriminate me."

The Court: That isn't the same as my copy here.

Mr. Goldschein: That's on page 36, may it please Your Honor.

The Court: That's what I have.

Mr. Goldschein: I repeat the question.

The Court: You skipped some, didn't you?

Mr. Goldschein: Sir?

The Court: Start at the top of page 36.

Mr. Goldschein: "Q. You are not afraid that it may involve you in the commission of any offense against
30 the United States Government, are you?—A. Possibly.

"Q. Possibly what?—A. My answer is I don't desire to answer that question.

"Q. Do you have any official connection with the Communist Party?"

The Court: You asked him what his business was and he states. You left that out.

Mr. Goldschein: Yes, sir, I only put in here the questions that he refused to answer.

The Court: All right. Go ahead.

Mr. Goldschein: "Q. Do you have any official connection with the Communist Party?—A. I don't desire to answer that question on the ground that it might tend to incriminate me.

"Q. Sir?—A. I don't desire to answer that question on the ground that it might tend to incriminate me.

"Q. Do you hold any office, any official position with the Communist Party?—A. I don't—for the same reason, I don't desire to answer that question.

"Q. Have you ever held any position with the Communist Party?"

31 Page 37.

"A. I don't desire, for the same reason, to answer that question.

"Q. Did you ever collect any dues from the members of the Communist Party?—A. For the same reason, I don't desire to answer that question.

"Q. Did you ever assist in the calling of the membership of the Communist Party of Denver for a meeting of any kind?—A. For the same reason, I don't desire to answer that question."

Page 39.

The Court: All right.

Mr. Goldschein: "Now, Mr. Blau, where is Mrs. Blau now?"

The Court: Wait a minute. Where is that now?

Mr. Goldschein: Page 39, sir.

The Court: You pass up page 38, do you?

Mr. Goldschein: Yes, sir.

The Court: All right.

Mr. Goldschein: "Now, Mr. Blau, where is Mrs. Blau now?—A. My knowledge of her whereabouts at present is based on a privileged communication, as I understand it, under the laws of Colorado and therefore I don't intend to reveal it."

"Q. Is that a secret too?—A. I think I've made my answer very clear.

32 "Q. Is she away on business?—A. I don't desire to answer any question regarding her presence, where she is at present.

"Q. How long has she been gone?—A. I think I will have to give you the same answer on that.

"Q. Is she out of the city?—A. Same answer.

"Q. Same answer to what?—A. Her present location is a matter of privileged communication.

"Q. What do you mean by privileged communication?—A. Well, a privileged communication, to my understanding, is a communication between a man and his wife."

Page 40.

"Q. Mr. Blau, this grand jury requests the presence of your wife as a witness here and up till now you have been concealing her whereabouts and obstructing this grand jury from serving a subpoena, having a subpoena served on her. Are you going to persist in that?—A. My answer is that her whereabouts—my knowledge of her whereabouts is based on a communication which I understand is privileged under the laws of the State of Colorado, and I also understand under the federal law.

33 "Q. Mr. Blau, just to set you straight on that, I am advising you now that there is no such thing as a privileged communication in a matter of this sort, that the only privilege you have here is against self-incrimination for the violation of a federal offense.—A. Do I understand you correctly that the law regarding a privileged communication between a man and wife does not obtain in this forum?

"Q. I didn't ask you about any crime that your wife committed; I am only asking you now about the whereabouts of your wife."

Page 41.

"A. Well, I tell you that my knowledge of the whereabouts of my wife is based on a privileged communication. I don't desire to reveal it, based on that privileged communication. It may be necessary for me, if you inform me that no such privileged communication exists—

"Q. That's right.—A. I'd like to consult an attorney on that.

"Q. All right. You know where she is though?—A. Yes, I do."

Page 54.

"Q. Mr. Blau, are you prepared to tell us where Mrs. Blau is at the present time?—A. No, I am not."

34 The Court: What page now are you reading from?

Mr. Goldschein: 54. That is after Mr. Blau went out and consulted his counsel.

The Court: All right.

Mr. Goldschein: "Q. Mr. Blau, are you prepared to tell us where Mrs. Blau is at the present time?—A. No, I am not. I'm prepared to tell you that my understanding of what the law is is as follows—

"Q. We're not interested in your understanding of the law.—A. In that case, the answer is no, I am not.

"Q. Sir?—A. I am not.

"Q. You are not what?—A. Prepared to tell you where my wife is."

The Court: Mr. Blau, did you hear this reading?

Mr. Blau: Yes, sir.

The Court: Is that correct?

Mr. Blau: Yes, sir.

The Court: The answers that you made thereto are correct, are they?

Mr. Blau: Yes, sir.

The Court: All right. Do you want to change *you* mind?

Mr. Goldschein: On page—

35 The Court: I beg your pardon?

Mr. Goldschein: I have some further that I would like to read. This is yesterday's proceedings. Page 124.

The Court: Is this in regard to the same party?

Mr. Goldschein: Same party, yes, sir.

The Court: 124?

Mr. Goldschein: 124, in the middle of the page.

"Q. Have you ever collected any dues for the Communist Party?"

The Court: This is the same witness?

Mr. Goldschein: Yes, sir, Irving Blau.

"A. I refuse to answer that question."

Page 126.

"Q. Where is your wife at the present time?—A. I refuse to answer that, as I did yesterday, on the basis that my knowledge of her whereabouts is based on a privileged communication between husband and wife.

"Q. Are you fearful that your wife may be involved in a criminal action of some sort?—A. No, sir, I am not. If you can serve her with a subpoena I'm sure she will be glad to come and testify, just as I have.

"Q. Now, where do you suggest that we serve her with that subpoena?—A. I would suggest that that was your problem.

"Q. You refuse to tell us?—A. Yes.

36 "Q. You, of course, know where she is?—A. I have answered that I do.

"Q. So to put your mind at rest on any reservation that you might have, I am advising you now that the only

purpose of this grand jury wants your wife for is as a witness and for no other purpose. Do you still refuse to tell us where she can be served with process?—A. Yes, sir, I do. I would also like to add this, as I did before: If you can serve her I'm sure she would have no objection to come here as I did, voluntarily, after I was served to testify.

"Q. After you were served a subpoena to come?—A. That's right. You wouldn't expect me to come before I was served would you?

"Q. No, no. That's all; thank you."

The Court: Is that a correct transcript, Mr. Blau?

Mr. Blau: Yes, sir.

The Court: Do you still persist in that?

Mr. Blau: Under my understanding of the privileged communication, my privilege against self-incrimination under the appropriate amendments of the Constitution, which I think are the first and fourth amendments, I feel I must continue to persist in my answers.

37 The Court: Do you understand that this examination of grand jury isn't necessarily an investigation to see whether you violated the law or not?

Mr. Blau: Pardon me?

The Court: That it is just an investigation, that someone else may have violated the law.

Mr. Blau: Well, my answers regarding the whereabouts of my wife are to the effect that I need not bring testimony against her where she might possibly be incriminated.

The Court: You think it is testimony against her that you won't tell where she is?

Mr. Blau: No.

The Court: What has that got to do with it? She isn't charged with the violation of any law, is she?

Mr. Blau: She might possibly be. She might possibly be. I assume that that is one of the purposes for this grand jury.

The Court: And you don't care to change your answers?

Mr. Blau: Not if my understanding of the law is correct, sir.

The Court: I mean I'll give you an opportunity, if you want to go back before the grand jury and answer these questions. Do you want to avail yourself of that privilege?

Mr. Blau: Well, then may I ask this question? Is my understanding of my rights regarding privileged communications correct? If my understanding is correct, I certainly wish to take advantage of this law.

38 The Court: I don't think it is a privileged communication myself.

Mr. Blau: Well, then, may I ask this? Now—

The Court: You musn't ask—Of course, I'm glad to answer any questions, but they're not binding and you're not necessarily bound to follow my advice. You have counsel. You can advise with him and do as he tells you to do.

Mr. Blau: Yes, sir, I have consulted with counsel, but I think my understanding of the laws of evidence is correct in this respect: I feel that a communication between a man and wife is a priviledged communication, and, first that I need not give evidence against my wife; secondly, that I need not give evidence based upon a privileged communication between a husband and wife, and if that's the law, the protection of the land, I certainly wish to take advantage of it.

The Court: That is not the law, in my understanding, although your counsel may disagree with me.

Mr. Blau: Sir, I would be glad to produce a volume of the statutes of the laws of this state to that effect.

The Court: The laws of Colorado don't apply in the Federal Court. This is a Federal Court procedure.

Mr. Blau: Sir, I've had experience with military charges, having been an enlisted man and an officer in the army, and

that's my understanding of the laws pertinent to federal jurisdiction as well.

39 The Court: I know, but the privileged communications are only against something that may result in charging your wife with the violation of some law.

Mr. Blau: I understand.

The Court: The fact that you tell us what her address is can in no respect be evidence of any violation of law, as I see it.

Mr. Blau: I think it might possibly tend, in a connection, to do so, and that it is based upon a privileged communication. Now, may I make my position clear? It is certainly not my intent to obstruct this investigation or to obstruct justice, and I have no objection and I'm sure my wife has no objection if she is served to come here and testify—I've made that clear—but on the other hand, if this is a privileged communication I feel that I have a right to resort to that privilege, and that's my reason for my position.

The Court: What you are being asked is not for a privileged communication; you are just asked where this woman is so that the Government can call her as a witness.

Mr. Blau: My knowledge of her whereabouts is based on a privileged communication.

The Court: What?

Mr. Blau: My knowledge, or my understanding is that my knowledge is based on a privileged communication between her and me.

The Court: Every communication between a husband and wife is not privileged; it is only when it might result in their conviction for a crime.

40 Mr. Blau: Well, sir, I think that is the position of this grand jury, among others.

The Court: Let's get back to the question. Do you stand by these answers, and you have no desire to change your testimony on any of these answers you have made?

Mr. Blau: Assuming that my understanding of the law is correct, I think for the present I must say yes.

Mr. Goldschein: Your Honor, the witness has been advised that there is no action pending against his wife, that the grand jury is not investigating his wife, that we know of no crime that his wife has committed; secondly, there is no action anticipated, no action that we know of that could be anticipated against his wife.

The Court: Have you told him that people who are charged with crime are not called before the grand jury? If they had any charge against you or against your wife for violating any law you wouldn't be called as a witness.

Mr. Blau: But sir—

The Court: They call people as witness to the crime, but not the defendants themselves.

41 Mr. Blau: On the other hand, it is my understanding that grand juries do present indictments which themselves are the basis for prosecution.

The Court: No, I think you're wrong about that. Have you anything to say, Mr. Menin?

Mr. Menin: I want to say this, that as I understand the law of privileged communication, any communication between husband and wife is privileged. Now, merely based on the statements that were made to me by the defendants, by the witness, I have checked into the Colorado law on the subject and have pointed out to him what the law is. I think this particular witness had considerable training in law and has felt that in view of the wording of the statute in Colorado on the question of privileged communication that he was right in not revealing the whereabouts of his wife.

On the question of incrimination, I am prepared at this time and will be prepared much better, I think, within an hour, to present to the Court an abundance of law to show that the action of the grand jury in compelling witnesses to testify on questions that they feel may tend to incriminate them is illegal and—

The Court In other words, it is your point that the witness can decide for himself whether he should answer questions or not?

Mr. Menin: I will produce—I have the decisions of the Supreme Court of the United States on that and I have decisions—

42 The Court: The Supreme Court hasn't held any such thing. I don't care to hear you.

Mr. Menin: May I quote from the decision of the Supreme Court on this very issue?

The Court: What case have you got there?

Mr. Menin: I have two cases here, and I have—I think within a few minutes—I have two cases at this time, your Honor, and I have another one that bears on this precise issue.

Now, in the case of Counselman against Hitchcock, 142 U. S. Reports, commencing on page— It's a very long case and the Court goes into considerable discussion—commencing at page 547, I desire to quote from page 564.

"It remains to consider whether Sec. 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty of forfeiture. It follows, that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of
43 the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his

testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

"The constitutional provision distinctly declares that a person shall not be compelled in any criminal case to be a witness against himself; and the protection of section 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that incriminating evidence extracted from a witness against his will should not
44 be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso—

"In June, 1807, Chief Justice Marshall, in the Circuit Court of the United States for the District of Virginia, in Burr's Trial, 1 Burr's Trial, 244, on the question whether the witness was privileged not to accuse himself, said: 'If the question be of such a description that an answer to it may or may not criminate the witness—"

Now, it doesn't say that it must; it may or may not, and he is to determine whether it will or will not.

"—may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate himself, the court can demand no other testimony of the fact. . . According to their statement,' (the counsel for the United States) 'a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule

almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable
45 to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would be stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

Then it goes on and cites some other cases.

The Court: Is that the Counselman case?

Mr. Menin: That is the Counselman case, Your Honor. This is one of the leading cases and is still followed and was followed in a very recent case which I will have in a few minates. It was dated 1892. I might add that some of the questions which were sought to be elicited from the defendant and set out here have as much bearing and
46 are just as connected as the questions that were asked by counsel yesterday. For example:

"Q. Have you during the past year, Mr. Counselman, obtained a rate for the transportation of your grain on any of the railroads coming to Chicago, from points outside of this State, less than the tariff or open rate?

"A. That I decline to answer, Mr. Milchrist, on the ground that it might tend to criminate me."

The Court: Is Colnselman charged with a crime there?

Mr. Menin: No, he is merely being interrogated before a grand jury in the same situation that exists here.

Now the next question:

"Q. During the past year have you received rates upon the Chicago, Rock Island and Pacific from points outside of the State to the city of Chicago, at less than the tariff rates?—A. That I decline to answer on the same ground.

"Q. I will ask you the same question with reference to the Burlington.—A. I answer in the same way.

"Q. The same with reference to Atchison.—A. I can't recollect that we have done any business with that road.

"Q. Have you or the firm of Charles Counselman & Co. received any rebate, drawback or commission from the Chicago, Rock Island and Pacific Railroad Company, or the Chicago, Burlington and Quincy Railroad Company, on the transportation of grain from points in the
47 States of Nebraska and Kansas, to the city of Chi-
cago, in the State of Illinois, during the past year, whereby you secured the transportation of said grain at less than the tariff rates established by said railroad?—A. I decline to answer on the same ground—

"Q. Do you know any person, corporation or company who has obtained their transportation of grain from points or places in the States of Iowa, Nebraska or Kansas, to the city of Chicago, over the Chicago, Rock Island and Pacific Railroad, during the past year, at a rate and price less than the shipment, published and legal tariff rate at the time of such shipment?—A. I decline to answer for the reason that my answer might tend to incriminate me.

"Q. Do you know whether the Chicago, Rock Island and Pacific Railroad Company, within the past year, has charged, demanded or received from any person, company or corporation in the city of Chicago any less rate than the open rate, or rate established by said railroad company, on grain or other property transported by the said railroad company from points in the States of Nebraska, Kansas and Iowa, to the city of Chicago, in the State of Illinois? If you have such knowledge, give the name of such shipper of whom said rate was charged, demanded or received, and the amount of such rate and shipments, stating fully all the

particulars within your knowledge.—A. I decline to answer, for the reason that my answer might tend to
48 incriminate me."

And then there are several other questions along that line.

Now, in this case Mr. Counselman was held in contempt of court and a writ of habeas corpus was sued out in the District Court, of the Circuit Courts of the United States. The Circuit Court denied the writ and the case went to the Supreme Court. The Supreme Court reversed the Circuit Court of Appeals.

They cited many cases here, one of which says this:

"In regard to the clause above quoted from the bill of rights, the opinion says: 'By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime; or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offence by himself, in any prosecution then pending, *or*
that might be brought against him therefor, such dis-
49 closure would be an accusation of himself, within the meaning of the constitutional provision. In the absence of regulation by statute, the protection against such self-accusation is secured by according to the guilty person, when called upon to answer as witness or otherwise, the privilege of then avowing the liability and claiming the exemption; instead of compelling him to answer and then excluding his admissions so obtained, when afterwards offered in evidence against him. This branch of the constitutional exemption corresponds with the common law maxim,

nemo tenetur seipsum accusare, the interpretation and application of which has always been in accordance with what has just been stated."

Then it cites a number of cases.

"The opinion then cites the case of People vs. Kelly as holding that the clause in the constitution of New York of 1846 protected a witness from being compelled to answer to matters which might tend to criminate himself, when called to testify against another party; and also, People vs. Mather, 4, Wend. 229, as declaring that the exemption in the constitution of New York extended to the disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt might be established, although that fact alone would not indicate any crime. Then opinion then proceeds: 'The third branch of the provision in the constitution of Massachusetts, "or furnish evidence against himself," must be equally extensive in its application; and, in its interpretation, may be presumed to be intended to add something to the significance of that which precedes. Aside from this consideration, and upon the language of the proposition standing by itself, it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him. For all practical purposes, such disclosures would have the effect to furnish evidence against the party making them. They might furnish the only means of discovering the names of those who could give evidence concerning the transaction, the instrument by which a crime was perpetrated, or even the corpus delicti itself. Both the reason upon which the rule is founded, and the terms in which it is expressed, forbid that it may be proved in subsequent prosecutions, as admissions of facts sought to be established therein."

Now, that is the significant part here, the answer given by the prosecution, and I think your Honor would also ad-

vance that reasoning as to why they should answer, but the Supreme Court says, "Both the reason upon which the rule is founded and the terms in which it is expressed forbid that it should be limited." And the Court has indicated that it ought to be limited in that manner—"—be limited to confessions of guilt or statements which may be proved in subsequent prosecutions, as admissions of facts sought to be established therein."

51 The Court: Let me hear from the Government.

Mr. Menin: There is one later case I would like to read, Your Honor.

The Court: What is the later case?

Mr. Menin: The later case is United States vs. Weisman, which was decided in 1940 and which is also based on this issue.

The Court: Let me see it. I can look at it quicker than you can read it. What is the citation?

Mr. Menin: It's 111 Federal Reporter Second, at page 261.

The Court: Mr. Weisman's case is not in point because the witness who claimed this privilege was the man against whom a criminal charge has been made. There is no such situation presented here.

Mr. Menin: That was testimony before the grand jury and it—

The Court: The question was against him.

Mr. Menin Yes, but the court holds there that no matter how remote, he has the right to determine. That is the issue I want to bring up by that case. He has the right to determine.

In the Counselman case the situation was identical to the situation here. In the case Your Honor has before you the situation may have been somewhat different, but the rule of the court was that the witness himself is the one who shall determine.

52 The Court: Now just a minute. Lister to this Brown case, which is found in 276 U. S. page 145, where the Supreme Court says: The individual citizen may not resolve himself into a court and himself determine and assert the criminal nature of the contents of books and papers required to be produced."

In other words, it isn't for him to say whether they tend to incriminate him or not.

Mr. Menin: When was that case decided?

The Court: If every man could come in and say he refused to answer because it tended to incriminate him, we might as well close up the court here and every court in this land.

But that is the law and I don't care—

Mr. Menin: I'm not acquainted with the facts that exist in that case, but I think I could show your Honor where that case is distinguishable.

The Court: I don't think so.

Mr. Menin: This case is exactly in point.

53 Mr. Goldschien: I don't think Mr. Menin can show the cases in point.

Mr. Menin: I don't care what he thinks.

The Court: Just a minute, Mr. Menin.

Mr. Menin: I don't care what he says.

The Court: Mr. Menin, please be seated. You have finished your argument. Now, let the Government proceed.

Mr. Goldschien: Mr. Menin can't show that the Hitchcock case is in point. Counselman vs. Hitchcock was decided purely on an immunity statute, and Mr. Menin read the case and he knows it. The question there was whether or not that immunity statute was sufficiently broad to compel the witness to testify before a grand jury, and the question of privilege against self-incrimination is not involved in that case, and he knows it.

Mr. Menin: I refuse to have counsel make statements of that kind to me. Now, I've made my remarks to the Court, and I'm addressing my remarks to the Court, but inferences of that kind are entirely improper and I think counsel has no right—

The Court: Just sit down. Mr. Menin, please be seated.

Mr. Goldschein: And I say to your Honor, he made the statement to this Court with reference to Counselman vs. Hitchcock as loosely as he made the statements yesterday with reference to the grand jury proceedings in New York, in the indictment there. He read the case, he read it before he came into court and he read it to your Honor and he knows it is based on immunity statute and not privi-
54 lege. He stood here and read it to the Court and regarding the immunity statute he just brushed if off lightly and tries to give your Honor the impression that it is a privilege and not an immunity question.

The Court: Let me see the case, please.

Mr. Menin I want to point out to your Honor that in this case the Court refers to the immunity statute and says—

The Court: Let me see and I'll decide for myself.

Mr. Menin: —and says that the immunity would have obtained regardless of the statute.

The Court: You didn't mention immunity statute in your argument.

Mr. Menin: Well, I was trying to read the whole thing when your Honor stopped me. I was going to get to the whole thing, but I would point out to the Court—

The Court: Mr. Menin, please take your seat or the Court will have to take sterner measures with you.

Mr. Goldschein: May I make a statement to the Court? I think it would save your Honor a great deal of time if you would let me submit to your Honor a brief I prepared on that question with a great deal of authority from the

Supreme Court and others. It may save your Honor the time of reading that lengthy case.

The Court: Let me see it.

55 Mr. Menin: May I interrupt the Court just a second, your Honor?

The Court: No. Wait till I finish.

Mr. Menin, these cases seem to hold that subject to this reservation, the judge, "In our opinion is bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril."

Mr. Menin: There is a lot more to that.

The Court: "That the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility out of the ordinary course of the law and such as no reasonable man would be affected by should not be suffered to obstruct the administration of justice."

All the cases seem to hold that.

Then Justice Marshall said in the Aaron Burr case:

"It is alleged that he, the witness, is and from the nature of things must be the sole judge of the effect of his answer, that he is consequently at liberty to refuse to answer
56 any questions if he will say upon his oath that his answer to that question might incriminate himself, but there is no distinction from which takes from the Court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness."

That seems to be the trend of all the decisions.

Mr. Menin: Well, as your Honor is reading from the brief prepared by Mr. Goldschein, I think we should be—

The Court: I am reading from a case in the Courts, not from his brief.

Mr. Menin: I should like to have an opportunity to reply to his brief before your Honor decides that issue, then.

The Court: No, you cannot. I have to decide this matter this morning. You were told to be prepared on this matter and to cite your cases.

Mr. Menin: I can't hurry the plane from New York to Denver. I would be prepared—I've got some decisions that are coming from New York that are to be here. Now, I also have the indictment so that your Honor could see what the situation is, whether I have misrepresented to this Court, and I want to say now for the record that I very strongly resent the ungentlemanly remarks by Mr. Goldschein regarding my conduct in this court. I will stand on whatever remarks I have made in this court.

The Court: The Court isn't concerned with that, Mr. Menin. It is wholly outside the record. Now, this defendant, Mr. Blau, as I understand it, is afraid that the answer to these questions will incriminate his wife?

57 Mr. Blau: No, sir.

The Court: Now, he is no judge.

Mr. Menin: That isn't the way it was put. The answers to the questions concerning his wife he has refused to give on the ground that those are privileged communications between husband and wife, and therefore he is not bound to disclose privileged communications.

The Court: The Court can't take any stock in that, Mr. Menin. It is fallacious and not proper.

Mr. Goldschein: There are also other questions.

The Court: Are there any other questions you have, Mr. Goldschein?

Mr. Goldschein: Yes, sir, there are other questions in addition to the whereabouts of his wife, that he refused to answer, that I read there this morning. He refuses to answer those as well, and still persists in his refusal.

The Court: The Court feels that the grand jury is investigating certain matters—the Court is not advised what—but that it is necessary for the conduct of the courts of the country that witnesses may be subpoenaed and required to answer questions concerning matters that the grand jury has under investigation; furthermore, that no man, according to the authorities cited, can judge for himself whether a
58 question propounded to him, either before the grand jury or in court, tends to incriminate himself. This one case says he can't set himself as the court and decide that question. The question is to be decided by the court.

I have read these questions very carefully to the witness this morning and he still stands on his answers and says he does not care to correct them.

Mr. Blau: Sir, may I make a statement?

The Court: What is it?

Mr. Blau: The Communist Party has been determined, has been declared by Attorney General Clark to be a subversive organization.

The Court: Well, Mr. Attorney General Clark is not a court and we are not bound by his decision or his views.

Mr. Blau: Sir, as I understand it, Attorney General Clark is this District Attorney's superior. Now, the question propounded to me regarding my connection with the Communist Party, I feel that it is not a fantasy on my part; I feel that it would tend to incriminate me since my connection with an organization which has been declared by the United States District Attorney to be a subversive organization--

The Court: That has no power at law. The law is that anybody can belong to the Communist Party and it is not a crime to belong to the Communist Party or to be a so-called Communist irrespective of the fact that the courts don't
59 take much stock in Communistic doctrines and don't believe in it, but nobody can be prosecuted or ever has been prosecuted or convicted of being a Communist or belonging to any other political faction. It is only when they go beyond that and violate some specific statute of the United

States enacted by the Congress of the United States that a crime arises. Now—

Mr. Menin: In view of your Honor's remarks—

The Court: There is no evidence in these questions here, or no showing that there is any desire to prosecute you or your wife for any crime.

Mr. Blau: Sir, may I request—

The Court: Just a minute; just be seated, will you, please?

Mr. Menin: Before your Honor rules, may I make a single statement which I think will clear this matter up?

The Court: What is that?

Mr. Menin: In view of your Honor's remarks which you have just gotten into the record, may I have an opportunity to consult with the witness before your Honor rules on the question of contempt?

The Court: No, you cannot. I will give him an opportunity to change his testimony later. As I have stated before, in order to conduct the courts and prosecute people who violate crimes, it is necessary under the Constitution of the United States that an indictment be returned on them
60 before they can be tried here. Now, I don't know what matter the grand jury is investigating and concerning which this witness was called, but he can't set himself up and say a question would tend to incriminate himself just because he believes that himself.

As I have stated, it is no crime to be a Communist and the Supreme Court has so held, and we are bound by that, and the mere fact that the Attorney General of the United States denounces Communists has no bearing and is no authority for any action in this or any other court.

So the Court finds that the defendant is guilty of violating Sections 401 and 402 of Title 18 of the United States Code Annotated, and unless the witness decides to change his testimony and answer these questions freely and without any further question, the Court will now pronounce sentence. Do you desire to make any change?

Mr. Blau: May I have a few minutes to consult with my counsel at this time?

The Court: What?

Mr. Blau: I request a few moments to consult with my counsel.

The Court: Step outside and come back in five minutes.

(Whereupon Mr. Blau and his counsel, Mr. Menin, left the court room.)

Mr. Menin: If the court please, I have just received some very pertinent cases.

61 The Court: Where is the defendant?

Mr. Menin: He is still consulting with one of his friends out there.

The Court: Tell him to come back in Court. Bring him in court, Mr. Marshal.

Mr. Menin: I'll get him.

(Mr. Blau enters the court room.)

The Court: Will you step up here to the bar of the court?

Mr. Menin: May I, for the purpose of the record—

The Court: No, just wait a minute until the Court finishes. What is your name?

Mr. Blau: Irving S. Blau.

The Court: How old are you?

Mr. Blau: 34, sir.

The Court: Where were you born?

Mr. Blau: *Younkers*, New York.

The Court: The Court having found you guilty of contempt and in violation of the laws of the United States, it is the sentence and judgment of the Court that you serve a term of six months in jail and be committed to the custody of the Attorney General.

What is the next case?

Mr. Menin: May I ask that bail be allowed, pending appeal?

62 The Court: I will grant no bail. You can go down to Judge Phillips; he might grant it.

Mr. Menin: Well, I can't be here and there at the same time. I understand Judge Phillips is leaving in a few minutes and if your Honor will suspend these proceedings until I can—

The Court: The Court has ruled. I don't care to hear any more from you in this case.

Mr. Menin: Let the record so show.

The Court: What is the next case?

Mr. Goldschein: May it please Your Honor, Mr. Kleinbord was supposed to be here this morning and he first called and said that he wasn't feeling well and the marshal, after calling me, told him that he was instructed to be in court this morning. He then called back and said that he isn't feeling well, the doctor ordered him to stay in bed. Now, his illness seems to be rather sudden and he's confined to bed rather suddenly. I think that the Court should have some means of determining whether or not his being in bed is due to actual—

The Court: Is he under subpoena?

Mr. Goldschein: Yes, sir, under subpoena before the grand jury.

The Court: Was he told to report today?

Mr. Goldschein: Told to report today, yes, sir. Instead of coming in he called. I think there ought to be some means of determining—

63 The Court: Issue a warrant for him, Mr. Marshal, at once, and bring him before the Court tomorrow morning at ten o'clock. Take him into custody as soon as you can get him.

What is the next case? Can we dispose of these ladies now?

Mr. Goldschein: Mrs. Jane Rogers.

The Court: Is she here?

Mr. Goldschein: She is here, yes, sir. Now, may it please Your Honor—

The Court: Step over here, madam. What is the status of her case?

Mr. Goldschein: Mrs. Rogers refuses to answer the questions propounded to her in the grand jury room. She was brought back on yesterday, but says that she will answer one question but will not answer any others, and was advised that it would be necessary for her to answer all questions propounded except those which would incriminate her for the violation of a federal offense, and she says she won't answer any.

The Court: Is that your position, madam?

Mr. Menin: I think there has been a misunderstanding.

The Court: Just a minute. Will you please be seated, Mr. Menin? Please be seated.

Mr. Menin: Well, I represent this lady.

The Court: Just a moment. Please be seated.

Mr. Menin: Very well.

64 The Court: I'll hear you in due course Madam, do you still persist in not answering these questions?

Mrs. Rogers. Well, on the basis of Mr. Menin's statements this morning—

The Court: Will you please answer the question yes or no?

Mrs. Rogers: Well, I think that's rather undemocratic I'm a very honest person. Would you mind letting me consider—

The Court: Make any statement you wish.

Mrs. Rogers: Well, as I said before, I'm a very honest person and I'm not acquainted with the tricks of legal procedure, but I understand from the reading of these cases this morning that I am—and I do have a right to refuse to answer these questions, on the basis that they

would tend to incriminate me, and you read it yourself, that I have a right to decide that.

The Court: You have not the right to say.

Mrs. Rogers: According to what you read, I do. I stand on that.

The Court: All right. If you will make no changes, it is the judgment and sentence of the court you be confined to the custody of the Attorney General for four months. Call the next case.

Mr. Goldschein: Miss Wertheimer, Nancy Wertheimer.

The Court: Will you come forward, madam? What is her situation?

Mr. Goldschein: Miss Wertheimer assumes the same attitude that she did on yesterday before the Court. She refuses to answer any questions before the grand jury.

65 The Court: Is that true, madam?

Miss Wertheimer: Yes, sir.

The Court: Do you persist in that? You don't want to change your testimony?

Miss Wertheimer: Under the circumstances I have no wish to change my stand on this.

Mr. Menin: May I make a statement on behalf of this witness now to your Honor?

The Court: All right.

Mr. Menin: I have here a decision which has exactly the precise situation.

The Court: A decision?

Mr. Menin: Yes, Your Honor.

The Court: By whom?

Mr. Menin: By a district court.

The Court: What district court?

Mr. Menin: The district court of the United States of the District of Columbia.

The Court: Let me see it. Hand it up. Are you familiar with that, Mr. Goldschein?

Mr. Menin: I just received this a moment ago, Your Honor. I also have, with Mr. Goldschein's permission, copies of the indictment which I think bears out every statement that I have made to the Court.

66 Mr. Goldschein: No, they don't.

Mr. Menin: Well, I've got them here and I'd like for the Court to see what people were indicted for.

The Court: He quotes from the Burr case, which I just read this morning.

Mr. Menin: Yes, but he decides a case which is exactly on all fours with this case here where the question was asked, "Are you a member of the Communist Party?" and the answer was refused on the ground of incrimination.

The Court: These people have all refused to answer questions other than whether they are Communists or not.

Mr. Menin: Oh, no. I would like to read that case to Your Honor. I had it read to me yesterday, and I think that it bears very much on the issues in this case. It's short and I'd like to have it in the record.

The Court: I can't agree with this opinion. Where is the party?

Mr. Menin: Well, may I have it? Now, just—

The Court: Just a minute.

Mr. Menin: This is something else. Just to show that I have not misrepresented to the Court, I would like Your Honor to read the indictment.

The Court: I'm not concerned with that question. It doesn't throw any light on this question.

67 Mr. Menin: No, but it does throw light on the statements—

The Court: Will you please be seated? If you don't obey the Court I will take you into custody.

Madam, as I understand it, you still refuse to answer these questions?

Miss Wertheimer: Yes, sir. May I make a statement?

The Court: Certainly.

Miss Wertheimer: I feel that this is a star chamber method, the methods that were used in Hitler Germany. You haven't been willing to grant Mr. *menin*, as my counsel, the right to read anything into the records; you haven't granted any of the so called defendants here, who have not done anything against the interests of the United States, the right to defend themselves as they should be defended, and I feel this is something that's got to be gotten out of the system of the United States, this kind of procedure.

The Court: If that's all you have to say, it is the judgment and sentence of the Court that you serve four months in the custody of the Attorney General. That's all.

This indictment, Mr. Menin, is for violation of Sections 10 and 13 of Title 18 of the United States Code, and the charge simply is that the defendant is a member of the Communist Party.

Mr. Menin: That's right.

The Court: As I have said here, being a member of the Communist Party, in my opinion, is not a crime, and there is no such question before the Court here.

68 Mr. Menin: You see what I was—

The Court: That's all, I've answered you, Mr. Menin. That's all. You can take your case to the Court of Appeals if you care to.

Mr. Menin: I guess we'll have to.

The Court: What's next?

Mr. Goldschein: Mr. Arthur Bary, may it please Your Honor.

The Court: Where is he? What is the situation?

Mr. Goldschein: Mr. Bary refuses to answer questions before the grand jury, may it please your Honor.

The Court: Where are they?

Mr. Goldschein: He deliberately refuses to answer; just simply, "I refuse to answer." When asked whether these questions—

The Court: Where is that in the transcript?

Mr. Goldschein: Beginning on page 73, may it please Your Honor.

The Court: 73?

Mr. Goldschein: Yes, sir.

The Court: Where does his testimony start?

Mr. Goldschein: It begins on page 55, may it please Your Honor.

The Court: All right. Now, what is it you want to refer to?

69 Mr. Goldschein: It hasn't been transcribed as yet. If Your Honor will recess for a few minutes I'll have it transcribed and we'll save a lot of time in the Court. I was preparing the case this morning of Kleinbord, believing he would be here, assuming that would take until noon, but since Kleinbord wasn't here I thought I could take up Mr. Bary.

The Court: Those other matters then will go over until ten o'clock tomorrow morning. What is this man't name?

Mr. Goldschein: Arthur Bary.

The Court: Will you be here then, Mr. Bary?

Mr. Bary: Yes, sir.

The Court: You can go then on your own recognizance, on the understanding you'll be here tomorrow morning.

Mr. Bary: I've been here every day, sir.

The Court: Al right, I'll take your word for it.

Filed September 27, 1948.

Clerk's Certificate.

115 I, G. Walter Bowman, Clerk of the District Court of the United States, for the District of Colorado, do hereby certify the above and foregoing pages, numbered one (1) to One Hundred Fourteen (114), both inclusive, to be a full, true and correct transcript of the record and proceedings as designated by counsel and as required under Rule 39(b)(1) of the Rules of Criminal Procedure, in the cases lately pending in this court, as follows:

1. Wherein The United States of America was plaintiff, and Jane Rogers was defendant, Criminal No. 11688;

2. Wherein The United States of America was plaintiff, and Nancy Wertheimer was defendant, Criminal No. 11689; and

3. Wherein The United States of America was plaintiff, and Irving Blau was defendant, Criminal No. 11690,

as fully and completely as the same still remain on file and of record in my office at Denver, Colorado.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this 14th day of October, A.D. 1948.

(Seal) G. Walter Bowman, Clerk.

Filed October 18, 1948. Robert B. Cartwright, Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

No. 3782.

ARTHUR BARY, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

No. 3783.

PAUL MEIR KLEINBORD, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

Statement of Points.

Come now the above entitled appellants and file the following Statement of Points upon which they will rely in the prosecution of their appeal herein.

1. The District Court erred and acted in excess of its jurisdiction in adjudging appellants in contempt of court in violation of Title 18, Sec. 401 United States Code.

2. The District Court erred and acted in excess of its jurisdiction in adjudging appellants in contempt of court in that said record fails to disclose any violation of a court order.

3. The District Court erred and acted in excess of its jurisdiction in adjudging appellants in civil contempt and committing them to the custody of the United States Marshal to be confined until such time as appellants purge themselves of contempt in view of the fact that the government was proceeding under Title 18, Sec. 401 United States Code, which

is under Chapter 21 providing for "Contempts Constituting Crimes".

4. The District Court erred and acted in excess of its jurisdiction in denying to appellants a jury trial in violation of the Constitution and laws of the United States.

5. The District Court erred and acted in excess of its jurisdiction and in violation of Amendment I of the Constitution of the United States.

6. The District Court erred and acted in excess of its jurisdiction and in violation of Amendment V of the Constitution of the United States.

7. The District Court erred and acted in excess of its jurisdiction when it found the appellants guilty of contempt for failure to answer certain questions before the Grand Jury without requiring the government to indicate sufficiently the nature of the inquiry.

8. The District Court erred and acted in excess of its jurisdiction in adjudging and sentencing appellants for contempt by reason of their refusal to answer certain questions concerning their membership in or connection with the Communist Party in that said appellants declined to answer same on the ground said answers may tend to incriminate them in violation of their rights under the Constitution of the United States.

9. The proceedings in the court below is void in that said court did not accord appellants due process of law.

(Illegible) MENIN, Attorney for appellants,
Arthur Bary and Paul Meir Kleinbord.

Received a copy of the above Statement of Points this 5th day of November, 1948.

MAX M. BULKELEY,
United States Attorney.

Filed November 5, 1948.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE J. FOSTER SYMES, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, PRESIDING IN THE FOLLOWING ENTITLED CAUSES:

In the Matter of the Presentment by the Grand Jury of Witnesses Arthur Bary, and Paul Meir Kleinbord.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

ARTHUR BARY, DEFENDANT.

No. 2548.—Civil.

THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

PAUL MEIR KLEINBORD, DEFENDANT.

No. 2550.—Civil.

Order Empanelling Grand Jury.

1 At this day, it is ordered by the Court that George O. Hodgson, one of the jurors aforesaid, be, and he is hereby, appointed to be foreman of the grand jury, and that Eudochia Bell Smith be, and she is hereby, appointed to be deputy foreman of the grand jury.

And thereupon, the said foreman and deputy foreman, and the said grand jurors, to-wit: Thomas William Alden, Felix Andrew, Ida Pearl Bloss, Dorothy Annette Dallemand, Chester A. DeGrofft, Orion W. Dickey, William John Donovan, Ralph J. Eaton, Carl O. Fagrelius, Fred D. Fouse, Harry Gude, Nettie Lucille Owens, Harry LaBonde, Harry M. Mayer, J. C. Morrison, Sadie Schultz, Logan Ray Scott,

Carlos L. Smith, Roberta E. Timberlake and Walter W. Towne, are now duly sworn and empanelled as a grand jury, according to law, and instructed by the Court touching their duties, and retire to their room under charge of the Marshal to consider of their presentments and findings of the matters given to them in charge.

Entered on the Docket September 20, 1948.

[Presentment Re Arthur Bary.]

Civil Contempt. Sec. 401, Title 18 U. S. Code.

To The Honorable J. Foster Symes, United States District Judge for the District Court of the United States for the District of Colorado:

2 The Grand Jurors of the United States of America for the District of Colorado, at Denver, Colorado, upon their oaths present:

That on or about the 20th day of September, 1948, the Grand Jurors for the United States of America duly empaneled and sworn in the District Court of the United States for the District of Colorado, at the May Term, 1948, of said Court undertook an inquiry concerning various employees of the United States Government who had allegedly made false statements in connection with their loyalty investigation in violation of Section 80, Title 18 U.S.C. and other criminal laws of the United States.

In pursuing such inquiry it became necessary for said Grand Jury to inquire into and ascertain the following: The names of the officers of the Communist Party of Colorado; the identity of persons in charge of the books and records of the Communist Party of Colorado, showing or pertaining to the membership of the Communist Party of Colorado.

Further, the Grand Jury presents, based upon testimony heard by it, that the witness, Arthur Bary, was chairman of the Communist Party for Colorado, and on the 21st

3 day of September, 1948, and subsequent thereto, the said Arthur Bary after being duly sworn was called upon to testify regarding the matters hereinabove recited;

That upon the refusal of the said Arthur Bary to answer certain questions propounded by said Grand Jury, he was requested to appear before the Honorable J. Foster Symes on the 24th day of September, 1948, in open Court, on a matter of contempt, at which time the said Arthur Bary answered the particular questions he had refused to answer previously, after being instructed to do so by the Court, and was held to have purged himself of contempt;

That the Court, upon request of the Grand Jury at that time, did place the said Arthur Bary on notice that certain specific questions would be propounded to him by the Grand Jury when he was recalled before that body to testify on Wednesday, September 29, 1948, and the Court did then and there give notice to the said Arthur Bary that he should be prepared to answer the said specific questions, which were as follows:

1. How many clubs, cells, or subdivisions of the Communist Party of Colorado are there functioning at the present time in the State?

2. Who are the officers of each particular club, cell or subdivision of the Communist Party of Colorado? State their names and addresses.

3. State the names and addresses of all members of each particular club, cell or subdivision of the Communist Party of Colorado.

4. Produce the book or books in which the dues paid by each member of each club, cell, branch or subdivision of the state organization are recorded, or if you do not have custody or possession of such books, state to the grand jury who does have possession and custody of such books.

Further, the Grand Jury presents that on the 29th day of September, 1948, the said Arthur Bary was recalled as a witness before the said Grand Jury, under oath, at which time said Grand Jury continued its inquiry in connection with the matters before it, and propounded the four above listed questions to the said Arthur Bary;

That the said Arthur Bary did choose to answer only one

of the four questions listed above, namely, question number 4, in the following manner, that he did not have custody or possession of said books or records and that to the best of his knowledge he was not aware who had them. He then persistently refused to answer the remaining three questions, namely, questions 1, 2 and 3;

The Grand Jury does further present that the said witness, Arthur Bary, in addition to the above refusals, did persistently and willfully refuse to answer numerous other questions propounded to him at that time concerning the names and titles of officers of the Communist Party of Colorado, and its various subdivisions; the name of his predecessor, as chairman of the Communist Party of Colorado; the name of the person or persons who appoint particular officers to positions in the Communist Party of Colorado; whether particular officers of the Communist Party of Colorado act under the direction of the chairman of the Communist Party of Colorado; the name of the person or persons responsible for forwarding a portion of the dues collected by the Communist Party of Colorado to the national organization; the names of members of the Communist Party of Colorado who actually collect dues from the members of that organization, or the name or names of a person who could furnish such information to the Grand Jury; whether or not he knew five persons residing in the State of Colorado whose names and addresses were given to him; and finally whether he attended any meetings of the Communist Party of Colorado in the years 1947 and 1948; and other questions, all of which more fully appear from a transcript of the Grand Jury proceedings attached hereto and made a part hereof by reference;

That the said Grand Jurors upon their oaths present;

That the said Arthur Bary, a witness before this Grand Jury, has again given obstructive, evasive and contumacious answers to questions propounded to him before this Grand Jury and has deliberately, willfully and contumaciously obstructed the investigation of this Grand Jury in the matter hereinabove set forth. The testimony of the said Arthur Bary is appended hereto and made a part hereof by reference.

That the said Arthur Bary willfully, deliberately and con-

tumaciously obstructed the process of this Court in refusing to answer questions, thus impeding, delaying and hampering the instant investigation, and sought to shut off and block the instant inquiry by making evasive answers and by failing and refusing fully to answer these proper questions put to him in the proceeding before the Grand Jury and;—

That the said Arthur Bary be compelled through the remedial process of this Court to answer the questions lawfully propounded to him by the Grand Jury.

Dated at Denver, Colorado, this 6th day of October, 1948.

G. O. Hodgson, Foreman.

Max M. Bulkeley, United States Attorney.
M. H. Goldschein, Special Assistant Attorney General.

Filed October 6, 1948.

Order to Show Cause.

33 The Grand Jury having this day returned a presentment for contempt against Arthur Bary praying that the coercive and remedial power of this Court to be used to compel him to answer the proper questions propounded to him;

It is, therefore, ordered that a copy of the presentment together with his Grand Jury testimony be served on him; that he shall appear in open Court on October 8th, 1948, at 2:00 P.M. to show cause why he should not be held in contempt of this Court in accordance with the prayer of said presentment.

Dated at Denver, Colorado, October 6, 1948.

J. Foster Symes,
United States District Judge.

Filed and Entered on the Docket October 6, 1948.

Order Continuing Hearing on Order to Show Cause.

34 This matter coming on for hearing on the oral motion of The United States of America for a con-

tinuance of the hearing on the Order to Show Cause in the above entitled case.

It Is Therefore Ordered that hearing on the Order to Show Cause be continued until Tuesday, October 12, 1948, at 10:00 o'clock a.m.

Entered on the Docket October 7, 1948.

Request for Jury Trial.

35 Comes now Paul Meir Kleinbord and Arthur Bary, by their attorney, Samuel D. Menin, and show:

That this is a proceeding under Title 18, Sec. 401 of the U. S. Code.

That Title 18, Sec. 401 is under Chapter 21 designated "Contempts Constituting Crimes".

That under Amendment VI of the Constitution of the United States "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *".

That under Article III Sec. II paragraph 3 of the United States Constitution: "the trial of all crimes, except in cases of impeachment shall be by a jury * * *".

Wherefore, the parties herein pray that they be granted jury trials in accordance with the law of the land.

SAMUEL D. MENIN,
Attorney for Paul Meir Kleinbord and Arthur Bary.

Filed October 12, 1948.

Answer to Order to Show Cause.

36 Comes now Arthur Bary, by his attorney Samuel D. Menin, and for Answer to the order dated October 6, 1948, to show cause why he should not be held in contempt of court shows:

1. That the order to show cause and the presentment of the Grand Jury should be dismissed in that said present-

ment makes public the secret testimony before the Grand Jury in violation of the oath of secrecy and in violation of Sec. 6(e) Federal Rules of Criminal Procedure.

2. That said Arthur Bary in refusing to answer the questions put to him was entirely justified in that said questions were such as were infringing upon his constitutional right to entertain any political view and to speak out those views or remain silent regarding same as is provided by means of the first amendment to the Federal Constitution.

3. That by virtue of the immunity against self-incrimination provided by the 5th Amendment to the *Unites* States Constitution, the said Arthur Bary was justified in refusing to answer the questions and each of them set forth in said presentment for the reason that said questions and each of them were of such character as to cause reasonable apprehension on his part that an answer to said questions might tend to incriminate him and might expose him to prosecution for a Federal criminal offense or offenses, particularly in view of the following premises and circumstances to wit:

(a) The provision of Title 18. U.S.C. sections 10-13.

(b) The indictments returned by the United States Grand Jury in New York against persons solely because of
37 their membership and activity in the Communist party. Copies of said indictments are hereto attached as Exhibits A and B, and by referenre made a part hereof.

(c) The findings of the Un-American activities committee to the effect that the Communist party is subversive and illegal.

(d) The designations of the Attorney General of the United States that the Communist party is subversive and disloyal.

(e) The executive order issued by President Truman on March 22, 1947, designating the Communist party as disloyal.

4. That the government by reason of the first amend-

ment to the United States Constitution has no right to inquire into the political views and beliefs of any person.

5. That the presentment and show cause order be dismissed for the reason that the entire proceeding herein attempts to place in disrepute and to cause the public to be prejudiced against a legal political party on the eve of a political election and thus renders ineffectual the efforts of the officers and candidates of said political party and serves to prevent the people of Colorado from having a free choice in the election.

6. That the presentment and show cause order should be dismissed in that the questions asked are not prefaced by any reasonable or sufficient showing as to the object of the inquiry being pursued by the Grand Jury.

7. That the presentment and show cause order should be dismissed for the reason that there is no showing as to the real nature of the matters under inquiry.

8. That the presentment and show cause order should be dismissed for the reason that they fail to disclose any violation of Title 18, Sec. 401 U.S. Code, in that it
38 fails to show any order of court was violated.

SAMUEL D. MENIN,
Attorney for Arthur Bary.

[Verified.]

Filed October 12, 1948.

[Exhibit A to Answer to Show Cause.]

In the District Court of the United States for the Southern District of New York. United States of America vs. Benjamin J. Davis, Jr. No. C-128-93.

39 The Grand Jury charges:

1. That from on or about July 26, 1945, and continuously thereafter up to and including the date of the filing of this indictment, the Communist Party of the United States of America has been a society, group, and assembly of persons who teach and advocate the overthrow and de-

struction of the Government of the United States by force and violence.

2. That from on or about July 26, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Benjamin J. Davis, Jr., the defendant herein, has been a member of said Communist Party of the United States of America, the defendant well knowing during all said period that said Communist Party of the United States of America was and is a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence.

In violation of Section 10 and 13, Title 18, United States Code.

[Exhibit B to Answer to Show Cause.]

In the District Court of the United States for the Southern District of New York. United States of America vs. William Z. Foster, Eugene Dennis, also known as Francis X. Waldron, Jr., John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, also known as Israel Regenstreif, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, also known as Arno Gust Halberg. No. C-128-87.

40 The Grand Jury charges:

1. That from on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, William Z. Foster, Eugene Dennis, also known as Francis X. Waldron, Jr., John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, also known as Israel Regenstreif, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, also known as Arno Gust Halberg, the defendants herein, unlawfully, wilfully and knowingly, did conspire with each other, and with divers other persons to the Grand Jurors unknown, to organize as the Communist Party of the United States of America a society, group, and assem-

bly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence, which said acts are prohibited by Section 2 of the Act of June 28, 1940 (Section 10, Title 18, United States Code), commonly known as the Smith Act.

2. It was part of said conspiracy that said defendants would convene, in the Southern District of New York, a meeting of the National Board of the Communist Political Association and for the purpose of organizing as the Communist Party of the United States of America a
41 society, group, and assembly of persons dedicated to the Marxist-Leninist Principles of the overthrow and destruction of the Government of the United States by force and violence.

3. It was further a part of said conspiracy that said defendants would thereafter convene, in the Southern District of New York, a meeting of the National Committee of the Communist Political Association on or about June 18, 1945, to amend and adopt said draft resolution.

4. It was further a part of said conspiracy that said defendants would thereafter cause to be convened, in the Southern District of New York, a special National Convention of the Communist Political Association on or about July 26, 1945, for the purpose of considering and acting upon said resolution as amended.

5. It was further a part of said conspiracy that said defendants would induce the delegates to said National Convention to dissolve the Communist Political Association.

6. It was further a part of said conspiracy that said defendants would bring about the organization of the Communist Party of the United States of America as a society, group, and assembly of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and would cause said Convention to adopt a Constitution basing said Party upon the principles of Marxism-Leninism.

7. It was further a part of said conspiracy that said defendants would bring about the election of officers and the election of a National Committee of said Party, and would become members of said Party, and be elected as officers and as members of said National Committee and the National Board of said Committee, and in such capacities said defendants would assume leadership of said Party and responsibility for its policies and activities, and would meet from time to time to formulate, supervise, and carry out the policies and activities of said Party.

42 8. It was further a part of said conspiracy that said defendants would cause to be organized Clubs, and District and State units of said Party, and would recruit and encourage the recruitment of members of said Party.

9. It was further a part of said conspiracy that said defendants would publish and circulate, and cause to be published and circulated, books, articles, magazines, and newspapers advocating the principles of Marxism-Leninism.

10. It was further a part of said conspiracy that said defendants would conduct, and cause to be conducted, schools and classes for the study of the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.

In violation of Sections 3 and 5 of the Act of June 28, 1940 (Sections 11 and 13, Title 18, United States Code), commonly known as the Smith Act.

Filed October 12, 1948.

Order on Motions and Denying Request for Trial to Jury and Denying Motion of Defendant for Release on Bail

43 At this day comes Max H. Goldschein, Special Assistant to the Attorney General, Joseph N. Lilly and Edward E. Nevans, Jr., Assistant District Attorneys, and the defendant Arthur Bary in his own proper person and by Samuel D. Menin, his attorney, also comes

And the petition of the defendant Arthur Bary for disqualification of Judge J. Foster Symes, and the motion of the defendant Arthur Bary for a continuance of the proceedings herein, and the request of the defendant Arthur Bary for a trial by jury, and oral motion of the defendant Arthur Bary for release on bail, coming on now to be heard, are argued by counsel, and the Court having considered the same and being now fully advised in the premises;

It Is Ordered by the Court, for good and sufficient reasons to the Court appearing, that the said petition and motions herein be, and each thereof is hereby denied. To which ruling of the Court the defendant excepts.

Entered on the Docket October 12, 1948.

[Judgment and Commitment as to Arthur Bary.]

44 On this twelfth day of October, A.D. 1948, came Max H. Goldschein, Special Assistant to the Attorney General, Joseph N. Lilly and Edward E. Nevans, Jr., Assistant *district* Attorneys, as attorneys for the government, and the defendant, Arthur Bary, in his own proper person and by Samuel D. Menin, his attorney, and

Hearing on the order to show cause why the defendant, Arthur Bary, should not be held in contempt of this court for his failure to answer the questions propounded to him by the Grand Jury, and the Court having found the questions propounded to him by the Grand Jury to be proper questions, and the said defendant still refusing to answer the questions propounded to him, the Court finds the defendant, Arthur Bary, guilty of a contempt of this Court, and

It is Adjudged that the defendant, Arthur Bary, is hereby committed to the custody of the United States Marshal and by the said Marshal confined until such time as the defendant purges himself of said contempt or until the further order of the Court.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal

or other qualified officer and that the copy serve as the commitment of the defendant.

J. FOSTER SYMES,
United States District Judge.

Filed and Entered on the Docket October 12, 1948.

Notice of Appeal.

52 Name and address of appellant: Arthur Bary, 814 E. 24th Avenue, Denver, Colorado.

Name and address of appellant's attorney: Samuel D. Menin, 614 E. & C. Building, Denver, Colorado.

Offense: Contempt of Court, violation of Section 401 and Title 18, United States Code.

Concise statement of judgment or order:

On the 12th day of October, 1948, court ordered appellant to be in the custody of the United States Marshal and confined until such time as he purges himself of contempt or until further order of the court.

The above-named appellant hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated October 15, 1948.

SAMUEL D. MENIN,
Attorney for the Appellant.

Filed October 15, 1948.

[Presentment Re Paul Meir Kleinbord.]

Civil Contempt Sec. 401, Title 18 U. S. Code.

To the Honorable J. Foster Symes, United States District Judge for the District Court of the United States for the District of Colorado:

200 The Grand Jurors of the United States of America for the District of Colorado, at Denver, Colorado, upon their oaths present:

That on or about the 20th day of September, 1948, the Grand Jurors for the United States of America duly empaneled and sworn in the District Court of the United States for the District of Colorado, at the May Term, 1948, of said Court undertook an inquiry concerning various employees of the United States Government who had allegedly made false statements in connection with their loyalty investigation in violation of Section 80, Title 18 U.S.C. and other criminal laws of the United States.

In pursuing such inquiry it became necessary for said Grand Jury to inquire into and ascertain the following: The names of the officers of the Communist Party of Colorado; the identity of persons in charge of the books and records of the Communist Party of Colorado, showing or pertaining to the membership of the Communist Party of Colorado.

Further the Grand Jury presents that a witness, Paul Meir Kleinbord, was called before said Grand Jury on the 21st day of September, 1948, and subsequent thereto, and the said Paul Meir Kleinbord, after being duly sworn, was called upon to testify regarding the matters hereinabove recited.

201 That upon the refusal of the said Paul Meir Kleinbord to answer certain questions propounded by the said Grand Jury, he was requested to appear before the Honorable J. Foster Symes on the 24th day of September, 1948, in open Court, on a matter of contempt, at which time the said Paul Meir Kleinbord, upon request of the Grand Jury, was instructed by the Court that freedom from self-incrimination applied only to a witness himself, and not to persons other than himself about whom he was questioned. The Court asked the said Paul Meir Kleinbord in open Court if he would answer questions of such nature when recalled by the Grand Jury, and the said Paul Meir Kleinbord stated to the Court that he would do so. The Court then held that the said Paul Meir Kleinbord had purged himself of contempt.

Further the Grand Jury presents that on the 29th day of September, 1948, the said Paul Meir Kleinbord was recalled as a witness before the said Grand Jury, under oath,

at which time the said Grand Jury continued its inquiry in connection with the matters before it, and propounded *various* questions to the said Paul Meir Kleinbord.

The Grand Jury does further present that the said witness, Paul Meir Kleinbord, did persistently and willfully refuse to answer questions propounded to him concerning the names of the members of the Communist Party of Colorado who were working under his direction as membership director of the Denver Section of the Communist Party of Colorado while he held that office; who appointed him membership director, and section organizer of the Denver Section of the Communist Party of Colorado; the number of, and the names of the Branches of the Denver Section of the Communist Party of Colorado; the persons
202 from whom he collected dues in the Denver Section of the Communist Party of Colorado; the names of committees on which he served in the Communist Party of Colorado; the names and addresses of the officers of each particular club, cell, branch or subdivision of the Denver Section of the Communist Party of Colorado; the names and addresses of all members of each particular club, cell, branch, or subdivision of the Denver Section of the Communist Party of Colorado; his attendance at meetings of the branches of the Denver Section of the Communist Party of Colorado, who were present at meetings of the branches of the Denver Section of the Communist Party of Colorado; and other questions, all of which more clearly appear from a transcript of the Grand Jury proceedings attached hereto and made a part hereof by reference;

That the said Grand Jurors upon their oaths present:

That the said Paul Meir Kleinbord, witness before this Grand Jury, has again given obstructive, evasive and contumacious answers to questions propounded to him before this Grand Jury and has deliberately, willfully and contumaciously obstructed the investigation of this Grand Jury in the matter hereinabove set forth. The testimony of the said Paul Meir Kleinbord is appended hereto and made a part hereof by reference.

That the said Paul Meir Kleinbord willfully, deliberately and contumaciously obstructed the process of this Court

in refusing to answer questions, thus impeding, delaying and hampering the instant investigation, and sought to shut off and block the instant inquiry by making evasive answers and by failing and refusing fully to answer these proper questions put to him in the proceeding be-
203 fore the Grand Jury and;—

That the said Paul Meir Kleinbord be compelled through the remedial process of this Court to answer the questions lawfully propounded to him by the Grand Jury.

Dated at Denver, Colorado, this 6th day of October, 1948.

G. O. Hodgson, Foreman.

Max M. Bulkeley,
United States Attorney.
M. H. Goldschein,
Special Assistant Attorney General.

Order to Show Cause.

226 The Grand Jury having this day returned a presentment for contempt against Paul Meir Kleinbord praying that the coercive and remedial power of this Court be used to compel him to answer the proper questions propounded to him:

It is, therefore, ordered that a copy of the presentment together with his Grand Jury testimony be served on him; that he shall appear in open Court on October 8th, 1948, at 2:00 P.M. to show cause why he should not be held in contempt of this Court in accordance with the prayer of said presentment.

Dated at Denver, Colorado, October 6, 1948.

J. Foster Symes,
United States District Judge.

Filed and Entered on the Docket October 6, 1948.

Order Continuing Hearing on Order to Show Cause.

227 This matter coming on for hearing on the oral motion of The United States of Americ for a continu-

ance of the hearing on the Order to Show Cause in the above entitled case.

It Is Therefore Ordered that hearing on the Order to Show Cause be continued until Tuesday, October 12, 1948, at 10:00 o'clock a.m.

Entered on the Docket October 7, 1948.

Answer to Order to Show Cause.

229 Comes now Paul Meir Kleinbord, by his attorney Samuel D. Menin, and for Answer to the order dated October 6, 1948, to show cause why he should not be held in contempt of court shows:

1. That the order to show cause and the presentment of the Grand Jury should be dismissed in that said presentment makes public the secret testimony before the Grand Jury in violation of the oath of secrecy and in violation of Section 6(e) Federal Rules of Criminal Procedure.

2. That said Paul Meir Kleinbord in refusing to answer the questions put to him was entirely justified in that said questions were such as were infringing upon his constitutional right to entertain any political view and to speak out those views or remain silent regarding same as is provided by means of the first amendment to the Federal Constitution.

3. That by virtue of the immunity against self-incrimination provided by the 5th Amendment to the United States Constitution, he said Paul Meir Kleinbord was justified in refusing to answer the questions and each of them set forth in said presentment for the reason that said questions and each of them were of such character as to cause reasonable apprehension on his part that an answer to said questions might tend to incriminate him and might expose him to prosecution for Federal criminal offense or offenses, particularly in view of the following premises and circumstances to wit:

(a) The provision of Title 18, U. S. C. sections 10-13.

(b) The indictments returned by the United States Grand Jury in New York against persons solely because of their

membership and activity in the Communist Party.
230 Copies of said indictments are hereto attached as Exhibits A and B, and by reference made a part hereof.

(c) The findings of the Un-American activities committee to the effect that the Communist party is subversive and illegal.

(d) The designation of the Attorney General of the United States that the Communist party is subversive and disloyal.

(e) The executive order issued by President Truman on March 22, 1947, designating the Communist party as disloyal.

4. That the government by reason of the first amendment to the United States Constitution has no right to inquire into the political views and beliefs of any person.

5. That the presentment and show cause order be dismissed for the reason that the entire proceeding herein attempts to place in disrepute and to cause the public to be prejudiced against a legal political party on the eve of a political election and thus renders ineffectual the efforts of the officers and candidates of said political party and serves to prevent the people of Colorado from having a free choice in the election.

6. That the presentment and show cause order should be dismissed in that the questions asked are not prefaced by any reasonable or sufficient showing as to the object of the inquiry being pursued by the Grand Jury.

7. That the presentment and show cause order should be dismissed for the reason that there is no showing as to the real nature of the matters under inquiry.

8. That the presentment and show cause order should be dismissed for the reason that they fail to disclose any violation of Title 18, Sec. 401 U. S. Code, in that it fails to
231 show any order of court was violated.

SAMUEL D. MENIN, Attorney for
Paul Meir Kleinbord.

[Verified.]

[Exhibits A and B to the answer of Paul Meir Kleinbord to the order to show cause are identical with the exhibits attached to the answer of Arthur Bary, which exhibits appear at pages 92 and 93.]

Filed October 13, 1948.

Order on Motions and Denying Request for Trial to Jury and Denying Motion of Defendant for Release on Bail.

236 At this day comes Max H. Goldschein, Special Assistant to the Attorney General, Max M. Bulkeley, District Attorney, and Edward E. Nevans, Jr., Assistant District Attorney, and the defendant, Paul Meir Kleinbord, in his own proper person and by Samuel D. Menin, his attorney, also comes.

And the petition of the defendant, Paul Meir Kleinbord, for disqualification of Judge J. Foster Symes, and the motion of the defendant, Paul Meir Kleinbord, for a continuance of the proceedings herein and the petition of the defendant, Paul Meir Kleinbord, for a trial by jury and oral motion of the defendant, Paul Meir Kleinbord, for release on bail, coming on now to be heard, are argued by counsel, and the Court having considered the same and being now fully advised in the premises;

It Is Ordered by the Court, for good and sufficient reasons to the Court appearing, that the said petition and motions herein be, and each thereof, is hereby denied. To which ruling of the Court the defendant excepts.

Thereupon, on motion of the District Attorney;

It Is Ordered by the Court that he be permitted to withdraw Exhibits 1 and 2 heretofore introduced herein.

Entered on the Docket October 13, 1948.

[Judgment and Commitment as to Paul Meir Kleinbord.]

237 On this thirteenth day of October, A. D. 1948, came Max H. Goldschein, Special Assistant to the Attorney General, Joseph N. Lilly and Edward E. Nevans, Jr., Assis-

tant District Attorneys, as attorneys for the government, and the defendant, Paul Meir Kleinbord, in his own proper person and by Samuel D. Menin, his attorney, and

Hearing on the order to show cause why the defendant, Paul Meir Kleinbord, should not be held in contempt of this court for his failure to answer the questions propounded to him by the Grand Jury, and the Court having found the questions propounded to him by the Grand Jury to be proper questions, and the said defendant still refusing to answer the questions propounded to him, the Court finds the defendant, Paul Meir Kleinbord, guilty of a contempt of this Court, and

It Is Adjudged that the defendant, Paul Meir Kleinbord, is hereby committed to the custody of the United States Marshal and by the said Marshal confined until such time as the defendant purges himself of said contempt, or until the further order of the Court.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

J. Foster Symes,
United States District Judge.

Filed and Entered on the Docket October 13, 1948.

Notice of Appeal.

239 Name and address of appellant: Paul Meir Kleinbord, 2427 Tremont Place, Denver, Colorado.

Name and address of appellant's attorney: Samuel D. Menin, 614 E & C Building, Denver, Colorado.

Offense: Contempt of Court, violation of Section 401 and Title 18, United States Code.

Concise statement of judgment or order: On the 13th day of October, 1948, court ordered appellant to be in the custody of the United States Marshal and confined until such time as he purges himself of contempt or until further order of the court.

The above-named appellant hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated October 15, 1948.

SAMUEL D. MENIN,
Attorney for the Appellant.

Filed October 15, 1948.

Stipulation for Consolidation of Record on Appeal.

54 It is hereby stipulated and agreed by and between Samuel D. Menin, counsel for Arthur Bary and Paul Meir Kleinbord, and Max M. Bulkeley, United States Attorney, that the above entitled matters may be tried on a single record in the United States Court of Appeals.

It is further stipulated and agreed by and between counsel for the respective parties that the above entitled matters may be combined for the purpose of presentation to the United States Court of Appeals.

SAMUEL D. MENIN,
Attorney for Arthur Bary and
Paul Meir Kleinbord.
MAX M. BULKELEY,
By E. E. NEVANS, JR.,
Attorney for The United States
of America.

Filed October 18, 1948.

[The transcript of proceedings, September 23, 1948, appears at pages 50 to 81, of this record.]

[Contempt Proceedings Against Arthur Bary and Paul Kleinbord, September 24, 1948.]

Before: The Honorable J. Foster Symes, United States District Judge.

288 Present: Mr. Max H. Goldschein, Special Assistant to the United States Attorney General; Mr. E. E. Nevans, Assistant United States District Attorney; Mr. Joseph N. Lilly, Assistant United States District Attorney; Mr. Samuel Menin, appearing on behalf of: Mr. Arthur Bary and Mr. Paul Kleinbord.

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289 The Court: Has the Government something ready in relation to the Grand Jury?

Mr. Goldschein: Yes, may it please your Honor. I have been assisting Mr. Bulkeley, the United States Attorney, working with his assistants, Mr. Lilly and Mr. Nevans, in presenting and assisting the Grand Jury in making investigation of certain violations of the Federal law in this district. In connection with that investigation, the Grand Jury has requested that I direct the Court's attention to the fact that certain witnesses who have been subpoenaed to appear before that Grand Jury and have appeared have wilfully and deliberately obstructed the business of that Grand Jury and hindered in obstructing them from finishing their investigation; that they are recessing today and will convene at some future date for the continuation of the business of the Grand Jury in this District. At that time they hope that they will be in a position to have those witnesses, namely, Jane Rogers, Nancy Wertheimer, Arthur Bary, Paul Kleinbord, Tracy Rogers, and Irving Blau to come again before the Grand Jury and make answer to such questions as are propounded to them that the Court directed them they must answer; that they have up to date refused to answer; and until that time, such time as they do answer those questions, the Grand Jury is unable to continue its investigation along the lines that they were going.

The Court: Is that correct, Mr. Foreman?

290 The Foreman: Yes, sir, your Honor, it is correct.

Mr. Goldschein: The entire Grand Jury, of course, was present at the investigation of these matters and they are all in Court now with the Foreman.

The Court: The Foreman has spoken for them.

Mr. Goldschein: Yes, sir. I just thought the record might show that they are all here in the presence of the Court.

The Court: Is that all you have?

Mr Goldschein: That's all except those other matters; that's all so far as the Grand Jury is concerned.

The Court: Ladies and gentlemen of the Grand Jury, you may retire and continue your deliberations. You may go now.

(Whereupon the Grand Jury retired from the court room.)

Mr. Goldschein: The Government is ready on Arthur Bary, may it please your Honor, a witness before the Grand Jury who has wilfully obstructed the business of the Grand Jury by wilfully refusing to answer questions before the Grand Jury and making other statements before the Grand Jury which tend to hinder and obstruct its investigation.

The Court: Is Mr. Bary present?

Mr. Bary: Yes, sir.

The Court: Have you a transcript?

Mr. Goldschein: Yes, sir, I have the questions and answers of his Grand Jury testimony that indicates or points up what he has refused to answer and those questions that led up to it. With the Court's permission I would like to read
291 them.

The Court: Very well. Have you another copy for me to follow?

Mr. Goldschein: Yes, I do have a copy. This is the original copy I made.

Mr. Menin: May it please the Court, as counsel for this witness I should like to have a copy of the questions and answers so that I may intelligently follow them and see what the position of the Government is regarding this witness.

The Court: I can't grant that request. You can listen to the questions as they are read. Please proceed.

Mr. Menin: Save an exception.

Mr. Goldschein: "Examination by Mr. Goldschein:

"Q. Your name is Arthur Bary?—A. That's right.

"Q. Mr. Bary, are you a member of the Communist Party?"

These are the questions, may it please your Honor, that were propounded to the witness before the Grand Jury and the answers he gave.

"Q. Mr. Bary, are you a member of the Communist —A. I am.

"Q. Do you hold any official position?—A. I do.

"Q. What position do you hold?—A. Chairman
292 of the Communist Party of Colorado.

"Q. Who is the secretary of the Communist Party? —A. Pat Bell."

Page 28:

"Q. Who is Miss Pat Bell, Mr. Bary?—A. What do you mean, who is she?

"Q. Who is she? What connection has she with the Communist Party?—A. She is the secretary of the Communist Party.

"Q. Who usually has care and custody of the books of the Communist Party?—A. Various people. Miss Pat Bell among them.

"Q. Now, will you tell us what other name you know Pat Bell by?—A. I'd rather not answer that question.

"Q. What objection do you have?—A. I just don't wish to answer.

"Q. You don't wish to?—A. That's right.

"Q. You mean you defy this Grand Jury?—A. I think I have a right to answer any question I wish and not to answer any question I wish.

"Q. On what do you base that?—A. On my personal right.

"Q. You are not afraid that it will involve you in
293 the incrimination of any Federal offense, are you?—
A. It might.

"Q. You mean by telling us who Pat Bell is or what other name she has may incriminate you for the violation of a Federal offense?—A. I refuse to answer on the ground it might incriminate me.

"Q. For a Federal offense?—A. I don't know Federal. I don't know what offense it might be. I just refuse on my own right.

"Q. I see. All right. Will you tell us whether or not her name is Blau?—A. I refuse to *auser* that question.

"Q. Will you tell us whether or not you knew at the time you told us her name was Pat Bell that her name was actually Patricia Blau?—A. I refuse to answer that question.

"Q. You say the last time you saw the books and records they were in the office of the Communist Party?—A. Yes.

"Q. Where is that office?—A. 929 Seventeenth Street.

"Q. Now, when was the last time you discussed those books and records of the Communist Party with anybody, Mr. Bary?—A. I don't recall.

294 "Q. Did you discuss them with anybody today?—A. Today?

"Q. Yes, sir, outside of this Grand Jury room.—A. I don't recall.

"Q. It is now five minutes after two, Mr. Bary, and you left this Grand Jury room at approximately *elven O'clock* this morning. Can you recall from eleven o'clock this morning until two o'clock this time, this afternoon, whether or not you discussed the books and records of the Communist Party with anyone?—A. I refuse to answer on the grounds it might incriminate me.

"Q. For the violation of a Federal offense, Mr. Bary?—A. I don't know what violation.

"Q. In other words, you don't know whether it will incriminate you or not? You just don't want to answer the question, do you?—A. That's right.

"Q. Sir?—A. That's right. I feel any way I may answer it, it may incriminate me, so therefore I don't want to answer it.

"Q. Incriminate you for what?—A. I don't feel
295 I can answer that question, therefore, I don't like to answer.

"Q. You feel like you don't want to answer it?—A. Yes, sir.

"Q. Now, will you authorize whoever has those books and records of the Communist Party, especially the list of the moneys received from the membership, to turn those books over to the Grand Jury upon their request?—A. I would like an opportunity to consult with my attorney before I answer that question.

"Q. Didn't you have that opportunity?—A. I didn't know what questions you were going to ask me.

"Q. I see.—A. I asked you why I was being asked these questions and nobody will tell me, so I can't presume what questions you would like to have answered, sir.

"Q. No, you can't presume.—A. No, I can't.

"Q. You advised with counsel today, didn't you?—A. I asked counsel what my Constitutional rights were, yes, sir.

"Q. And he advised you, did he not, that unless you were asked some question that incriminated you for the violation of a Federal offense that you would have to answer
296 the question?—A. The discussion I had with my counsel is a personal affair and I don't have to reveal it here. You know that, sir.

"Q. No, you don't have to reveal it.—A. That's right. The relationship between the counsel and myself is one that is between the counsel and myself.

"Q. You still insist that you won't answer even though—A. I would like to consult counsel on that question. I find myself incapable of answering that question. I would like to consult my counsel before I answer it. I'm only a layman; I'm not a lawyer."

"Q. Now, will you tell us where this Pat Bell, or Patricia Blau, is at the present time?—A. I do not know.

"Q. Sir?—A. I do not know where she is.

"Q. You do not know where she is?—A. That's right.

"Q. You know it's the same person, don't you?—A. Pardon?

"Q. You know it's the same person, don't you?—A. You said Patricia Bell? I don't know where she is.

297 "Q. Do you know where Pat Blau is?—A. No, I don't know where she is.

"Q. Do you know Pat Blau?—A. I refuse to answer that question.

"Q. Will you answer whether or not Pat Blau and Patricia Bell or Pat Bell are the same person?—A. You've asked me that question repeatedly and I've told you I refuse to answer.

"Q. Repeatedly?—A. Repeatedly.

"Q. Will you tell us when you last saw her?—A. I don't know. Maybe two or three weeks or a month ago, something like that.

"Q. If she were out of town on business for your organization, you would know it, would you not?—A. Not at all times. I've been out of town myself. I just came back.

"Q. How long were you gone?—A. I was on Vacation for about ten days.

"Q. You mean you hadn't been in Denver for ten days?—A. That's right.

"Q. Is Miss Bell on vacation?—A. I don't know where she's at.

298 "Q. She works under your supervision, does she not?—A. No, nobody works under me.

"Q. Nobody works under you?—A. I'm not an employer.

"Q. You are the president of the organization?—A. Of a voluntary organization.

"Q. That has some direction, I take it?—A. Just as the head of the American Legion doesn't know what any member of his organization is doing, so I don't know what any member of my organization is doing.

"Q. This is an officer of your organization, isn't it?—A. That's right. Just as the head of the American Legion wouldn't know what every officer of his organization is doing, so I don't know. It's a voluntary organization.

"Q. The books and records are kept under your direction, aren't they, as chairman or president of the organization?—A. I suppose so.

"Q. Will you produce those books and records?—A. I ask to have an opportunity to discuss with counsel and I will answer that question, sir.

"Q. How long is it going to take to discuss it with counsel?—A. Just as long as I can call him up. If you'll

299 help me call him up and have him come over here, I'll ask him.

"Q. We will excuse you, then. It wouldn't take you more than thirty minutes to talk to him about it, would it?—A. I don't think it would take more than two minutes to talk to him about it.

"Q. It is now ten minutes after two. We will recess you until a quarter of three.—A. All right.

(Witness excused.)"

* * * * *

"Q. Now, what record do you keep of his payment of dues?—A. Well, the secretary is—we don't have such a large membership. She knows more or less who pays it and who doesn't pay. She makes notations on it, I suppose, I don't know. I've never been connected with that aspect of it.

"Approximately how many members do you have here in Denver, Mr. Bary?—A. I'd rather not answer that, sir.

"Q. Well, can you just give us a rough idea? I don't want it exact.—A. Well, there are various estimates. The FBI estimates two thousand.

300 Q. Now, just a minute. I'm not interested in any smart answers. I haven't given you any.—A. I haven't given you any, either. I told you I'd rather not answer that question."

"A. You asked me how many members there were. I told you I'd rather not answer that question.

"Q. Is it because you don't know or don't want to tell us? —A. I may be wrong in giving you the number and I'd be open to perjury on one hand, and secondly I don't believe that I would care to reveal the amount that I think we have.

"Q. Well, can you give us your best estimate?—A. I'd rather not do that, sir.

"Q. You'd rather not?—A. Yes."

"Q. Have you ever been furnished with a list of the membership?—A. I do not recall.

"Q. Did you ever see a membership list?—A. I don't remember.

"Q. Can you tell us whether or not you have seen a membership list in the past thirty days?—A. I don't remember.

301 "Q. You don't remember whether you saw one in the past thirty days?—A. No."

"A. We have no list of members.

"Q. Do you have a list of those who pay dues?—A. We have no list of those who pay dues.

"Q. Now you know that of your own knowledge?—A. To the best of my knowledge we have no list; to the best of my knowledge.

"Q. You never saw a list?—A. To the best of my knowledge I haven't seen a list.—

"Q. To the best of your knowledge you have never seen

such a list; nobody has ever discussed such a list with you? Is that right?—A. That's right."

"Q. And in the *pst* three years have you ever had a record of the dues-paying members?—A. I don't recall. I don't believe so. I don't recall.

"Q. Did you ever have a record that showed the list of members and the amount of dues that they paid or were in arrears?—A. To the best of my knowledge, no.

"Q. And you never have seen any such record?—
302 A. To the best of my knowledge, no.

"You have a pretty good memory, I take it?—A. I don't know. I may have and I may not have. You have to ask the next man to pass on that.

"Q. The number on your card is No. 91643. Does that mean that there were 91,642 members ahead of you?—A. I couldn't answer that. Those cards are issued nationally and they are sent to every state organization and we then distribute them accordingly.

"Q. Who signed this card?—A. I did.

"Q. *Don* you sign them all?—A. I sign all the cards in this state; not nationally.

"Q. Now— —A. And in the states of Wyoming and New Mexico.

"Q. Who collects dues for you, Mr. Bary, for the Communist Party in Denver?—A. Who collects the dues?

"Q. Yes.—A. The secretary.

"Q. Who is she?—A. Pat Bell.

"Q. Pat Bell? Now, do you know what her other name is now?—A. I know her as Pat Bell.

303 "Q. You don't know her by any other name?—A. I'd rather not answer that, sir. I know her as Pat Bell. I identified her. I gave you her address today. That's how I know her as. She may have a married name, she may not; I don't know."

"Q. You have regular dues that you pay, don't you?—A. Oh, yes.

"Q. What is the dues?—A. Well, the rate is on that card there. I don't remember, I think it's listed on that card, the back or somewhere.

"Q. Oh, yes, depending on how much they earn a week?—A. From twenty-five cents a month up, or ten cents a month, pardon me.

"Q. Now how do they pay it? How do they pay the dues? —A. They put their hands in the pocket, take out the ten cents and pay it.

"Q. Let's don't be funny.—A. I've answered that question. They pay it into the secretary.

"Q. Do they pay it weekly or monthly or how?—A. They pay it by the month. Some pay two months ahead, some pay three months ahead, perhaps."

"Q. For the number of members in each particular club —I want to get an idea of that.—A. Well, I said they
304 vary from five upwards.

"Q. Yes, but somebody keeps track of that five up? —A. That's right.

"Q. Who keeps track of that five up?—A. Oh, certain individuals are selected in the club to do that little chore.

"Q. I see. They each have a chairman, a secretary, and treasurer?—A. It depends. Some do and some don't. Some of them may only have a chairman.

"Q. Does the chairman keep up with that?—A. In some instances he might. If there were nobody else around to do that chore he'd do it.

"Q. And if he doesn't do it who does?—A. Then somebody else might be assigned to that.

"Q. The secretary?—A. Either the secretary or the treasurer.

"Q. Now, do you know who does that in each organization?—A. No.

"Q. Who keeps up with that?—A. Who keeps up with what?

"Q. Who keeps up with that?—A. Oh, I know some of the people and Pat knows some of the people.
305 "Q. Who are the people you know that keep up with it?—A. I'd rather not mention any names, sir.

"Q. Do you refuse?—A. I refuse."

That is the substance of Mr. Bary's testimony before the Grand Jury, may it please your Honor.

306 The Court: Mr. Bary, did you hear that reading?

Mr. Bary: I did.

The Court: Is it correct?

Mr. Bary: Substantially correct.

The Court: Were those your *answer?*

Mr. Bary: They're not all the answers I gave, sir.

The Court: What do you mean? He hasn't read the whole transcript?

Mr. Bary: Well, Yes; I believe there are other parts of that, such as indicating the fact that I brought the books, the fact that I voluntarily gave them my card and that I testified that those were all the books that I could find in the office, which I brought there.

The Court: Did he bring any books in there, Mr. Goldschein?

Mr. Goldschein: Yes, but they were not the books that we were interested in. If your Honor please, I have the testimony here of another witness by the name of Kleinbord, and both going together, Your Honor might well understand how it fits in, what this witness knows and what the other witness knows, by the testimony of both. The other witness is here and his matter comes up following this, and the Court might hear them both together, because they pertain to the same question.

The Court: Well, this man did produce books?

Mr. Goldschein: He produced some books, but not the books we were interested in.

307 Mr. Bary: Your Honor, I was asked to bring books and it specifically states there, the books show the moneys and the dues received and those are the books that I brought in. I brought in a set of books that show the money received, the money expended, where it was received from, and where it was spent, and at the time that I was asked to get these books I was never told that what they wanted was a list of members, and then when they did ask me whether I had a list of members I informed them that I did not have a list of members.

I would just like to say to the Court that when I first went into this grand jury I came there voluntarily, I testified on the basis of what I knew, and as a matter of fact, until I was

impressed that actually there were rights of my own being violated—and I want to state here that the basis of my answers have been on the basis, one, of my constitutional rights, and secondly, that I have refused to answer such questions as I have felt might tend to incriminate me, and I have answered those questions which I have felt would not. I have not conducted a consistent refusal, but rather those questions which in my judgment and which on the basis of everything that I know, because today there is an indictment against the twelve Communist leaders—and I am a leader of the Communist Party, which specifically states that it is unlawful—and the grand jury has brought an indictment against them, that it is unlawful to organize the Com-
308 munist Party and it is a violation of the Smith Act, and therefore I had reason to believe that certain questions that were asked of me might tend to incriminate me, and might place me under such charges. That is the reason, Your Honor, that I have answered the way I have, and I think it has not been an indisposition to aid the grand jury, because I have, wherever I have had the things to give to the grand jury, I have given it to them, and those questions which I have felt would not incriminate me, I have answered; those questions that I have felt would incriminate me I have refused to answer.

Mr. Goldschein: May it please Your Honor, the grand jury has information that there is a book, and evidence of the fact that there is a book approximately ten inches wide and eight inches long, that contains the amount of dues paid by each individual member, with the initials of that member right alongside the amount of dues that he paid or is in arrears. That is an official record of the Communist Party of Colorado.

The Court: What crime does that tend to prove?

Mr. Goldschein: That proves no crime against Arthur Bary. It is not his record; he can not claim the privilege against self-incrimination and keep from producing that particular record, because that particular record is not his.

The Court: Do you know about that record he refers to?

Mr. Bary: Sir, I have never said that I had the record

and would refuse to give it, I have answered in the grand jury.

309 The Court: You heard what he said, this book of a certain size.

Mr. Bary: Yes. I have not seen such a book; I do not know where such a book is, and therefore I can not produce it.

The Court: What do you say to that, Mr. Goldschein?

Mr. Goldschein: Your Honor, just taking up the testimony, the statements of the next witness before the grand jury, will show to Your Honor just the situation we are in with reference to that particular book. One tosses it to the other, and here's a man who is responsible for it and refuses to give it up.

The Court: He says he never knew there was such a book.

Mr. Goldchein: Now we will show, may it please Your Honor, that that *books* was in the offices of the Communist Party.

Mr. Bary: Sir, there are many books in the offices of the Communist Party and I can not place myself here to say that I know the contents of every book that is in the communist party office.

The Court: Have you produced all the books?

Mr. Bary: Well, I can't say. There are some books—

The Court: Have you produced all the books that you know of in that office?

Mr. Bary: I have produced all the books that I know were there and I could bring down. I even suggested, if necessary, that a marshal would come with me. They asked me if I would be too tired to carry them myself. I said no, and I said, if that's the case I'll go to the office and get it.

310 I went and brought those books which were in the office and brought them back. I could not bring anything back that wasn't there.

The Court: You never heard of this particular book that the Government wants?

Mr. Bary: To the best of my knowledge I have not heard of it.

Mr. Goldschein: Mr. Bary made the statement that he appeared voluntarily before this grand jury. Of course, that isn't true.

The Court: We don't care about that. He says he has produced every book that he knows about. That's all you can charge him with.

Mr. Goldschein: The books are just part of this, may it please Your Honor. If he will tell us about these witnesses and answer these other questions we will find out.

The Court: Take one thing at a time. I would like to dispose of this question of the books. He said that he has produced every book that he knows is in the office or has ever seen, and it seems to me that answers your charges, doesn't it?

Mr. Goldschein: No, sir, it does not.

Mr. Menin: On the basis of the evidence it certainly does.

The Court: Just a minute. I'll hear you later, Mr. Menin.

Mr. Goldschein: Now the testimony of other witnesses before the grand jury, may it please Your Honor, is that two people have keys to that office, Bary and Kleinbord; that the books were in the office; that Kleinbord was responsible for working on those books up until three weeks ago and did work on them; that he left the grand jury room on day before yesterday and went back to the office to get the books and came back, in much surprise that the books weren't there. Now, nobody knew about those books and would tell us about the books, the existence of the books, until we got Mr. Kleinbord to describe them. Now, the only two men who have keys to that office say that they disappeared all of a sudden.

311

The Court: This man hasn't said they disappeared.

Mr. Goldschein: He said he never saw them.

The Court: He said he never saw them.

Mr. Goldschein: Yes. We have a witness who says that they were there. He worked on them.

Mr. Menin: This man can't be—

The Court: How can you prove this man saw them?

Mr. Goldschein: Your Honor has to hear the testimony of both of them.

The Court: You're assuming that they had the books.

Mr. Goldschein: No, he said that the books were in the custody of this other man, under the direction of Mr. Bary.

The Court: What proof is there of that fact?

Mr. Goldschein: Kleinbord's testimony.

312 The Court: Did he say Bary had those books?

Mr. Goldschein: No, sir; he said he was the secretary and that the books were in the office and he was working on them and that the books disappeared. He didn't know they had disappeared until he went to look for them.

The Court: That doesn't throw the onus on this gentleman to prove where the books have gone.

Mr. Goldschein: And at the time that he was relieved of these duties he discussed with Mr. Bary who was to be his successor and who was to take over these books.

The Court: Kleinbord said that?

Mr. Goldschein: Yes, sir. I'll read his testimony just as soon as Your Honor says so.

The Court: You can't say that this man has failed to produce that particular book you speak of because you haven't proven he ever saw it or it was ever in his possession.

Mr. Goldschein: That's right, we can't. There are a lot of things we can't prove, Your Honor. His general attitude before the grand jury, his statements of what he doesn't *what* to testify to, he doesn't want to answer—

The Court: Take those matters up later.

Mr. Goldschein: I say, may it please the Court, that you've got to take his attitude before the grand jury altogether with

his denial that he has those books, to say whether or not his statement that he doesn't have the books is worth consideration.

313 The Court: I don't know what his attitude was. I can't take judicial notice of that.

Mr. Goldschein: No, sir, but you have it from the whole transcript I read.

The Court: Take up something else he refused to do other than produce the books.

Mr. Goldschein: Well now, here is his statement from the beginning that I read to Your Honor, this playing with the grand jury on this question of Pat Bell or Pat Blau. His first statement before the grand jury with reference to this Pat Bell was that he had no idea that Pat Bell was Pat Blau. He knew who Pat Bell was, he knew who Pat Blau was, because he had been to her home, they had visited and—

The Court: What evidence have you of that?

Mr. Goldschein: Sir?

The Court: Is there any evidence of that before the grand jury?

Mr. Goldschein: Yes, sir, ~~that~~ he visited at their home. Yes, sir, there is evidence in the grand jury transcript that he visited in their home.

Mr. Bary: I testified to that effect, that I visited at their home.

The Court: When you say "their home," who do you mean?

Mr. Goldschein: Sir?

The Court: I'm asking Mr. Bary.

314 Mr. Bary: Yes, sir.

The Court: You say you visited in their home.

Mr. Bary: I testified I believed I had visited at their home; I wasn't too sure, but I thought I had. I think that is to the best of my recollection, and I thought they had visited me. I couldn't definitely state, and I stated that the reason I

couldn't definitely state, I didn't want to lay myself open to perjury, because if I said that I had and then it was revealed I hadn't then I would be guilty of perjury, or if I said I hadn't and then I had—I believed I had; and I told them I knew her as Pat Bell, and that's the way that I originally presented her name and that's the way that I have known her.

The Court: You said you went to "their home." Who do you mean by "Their home"?

Mr. Bary: To the home of Pat Bell and her husband, Irving.

The Court: Who is her husband?

Mr. Bary: Her husband, as I know him, is Irving, and yesterday I found out, subsequently, that their name is Blau but I have never questioned them, sir; I knew her as Pat Bell and worked with her as Pat Bell.

The Court: Where is their home?

Mr. Bary: —which I assume was her maiden name, that's all.

The Court: Where is their home that you visited?

Mr. Bary: I gave the gentleman here her address in the grand jury.

315 The Court: Have you that address?

Mr. Goldschein: We have that, yes, sir.

The Court: Did you go there and find out anything?

Mr. Goldschein: Sir?

The Court: Did you investigate that, go to the home there? He says he visited their home.

Mr. Goldschein: Yes, sir.

The Court: And he says he gave you the address.

Mr. Goldschein: Yes, sir, we had the address but we didn't know who that was.

Mr. Bary: I gave that address in the grand jury room.

The Court: Did you go out to that home and make an investigation?

Mr. Goldschein: Yes, sir, a subpoena has been out for Pat Blau for four days and to date nobody will tell us where Pat Blau is.

The Court: Have you been there?

Mr. Goldschein: Her husband refuses to tell us.

Mr. Bary: I do no know where she is and therefore I can't say where she is.

Mr. Goldschein: Here's exactly what he says on that:

"Q. Now, will you tell us what other names you know Pat Bell by?—A. I would rather not answer that question.

"Q. What objection do you have?—A. I just don't
316 wish to answer.

"Q. You don't wish to?—A. That's right.

"Q. You mean you defy this grand jury?—A. I think I have a right to answer any question I wish and not to answer any question I wish.

"Q. On what do you base that?—A. On my personal right."

The Court: What page is that?

Mr. Goldschein: That is on the first page, may it please Your Honor.

Mr. Menin: If the Court please—

Mr. Goldschein: Just a minute. Beginning a little above half way down.

"Q. Now will you tell us what other name you know Pat Bell by?"

The Court: What is your objection to answering that, Mr. Bary?

Mr. Bary: I didn't know her by any other name, sir, and I indicated that that was the name I knew her by and then he began to intimate there that I knew that there was another name and I wasn't telling them, and I felt that if I continued to answer that question I would place myself in perjury.

The Court: Have you ever known her by any other name?

317 Mr. Bary: To the best of my knowledge the only name and the name that I have operated with her by has been Pat Bell, and that's the testimony that I presented, and I gave them her address. If I hadn't wished to reveal anything of that sort I certainly wouldn't have given that information; and the record will show that I gave that information, without refusing—naming and giving the address, but I did not want to be placed in a position of perjuring myself, because I had failed to give perhaps two or three more names, and to the best of my knowledge I knew her as Pat Bell.

The Court: Are there any other names that you can give which would tend to identify her?

Mr. Bary: Which I can give?

The Court: Yes.

Mr. Bary: No.

The Court: You said there were some other names.

Mr. Bary: Well, I don't know. There may ever be other names. I don't know. The name I knew her by and that we worked with was Pat Bell.

Mr. Goldschein: Mr. Blau testified before the grand jury, may it please Your Honor, that he and his wife Pat Bell were in the home of Bary and his wife on several occasions. Now, at the bottom of that same page the question was asked—

Mr. Menin: Just a second.

Mr. Goldschein: "Will you tell us whether or not—"

318 Mr. Menin: I don't think—Just a minute.

Mr. Goldschein: Let me finish this, please.

Mr. Menin: I would like to interject that we are not bound by the testimony of this witness, as to the testimony of Mr. Irving Blau.

Mr. Goldschein: We will introduce it.

Mr. Menin: That's all right, but this witness is only bound

by what he knew and what he was able to disclose. He has already stated that at the time he was before the grand jury he didn't know that she went under the name of Pat Bell and Pat or Patricia Blau, but this morning he has testified that he has since found out, and he made the statement to the Court—he has made a full disclosure of everything that he possibly knows and everything that Mr. Goldschein has been objecting about, everything that Mr. Goldschein has been objecting about. Now, he made that disclosure. What more can he do? What further disclosure can he make to this Court? Now, he has testified about the books; he brought whatever books in that he had. He hasn't got any other books; he didn't know of any other books. Now if someone else testified that he knows of some books, certainly we're not bound by it. This man is under oath; this man is under oath and testified to what he knows of his own knowledge.

And as to the things he didn't know about, he indicated that he didn't know about those things, and I submit that if it is the purpose of counsel to now try to subject this man
319 to a contempt charge on the ground that he didn't disclose that Pat Bell was Patricia Blau or Pat Blau, certainly he has done it this morning by stating that he has since found out that Pat Bell was also known as Patricia Blau and has testified to that and made full disclosure of it.

Mr. Goldschein: His attitude this morning is a complete turn-about from what it was.

The Court: Just a minute. Is that all you have to say, Mr. Menin?

Mr. Menin: On this question, yes, and I don't think his attitude is a matter of contempt. We certainly can't convict a man on the attitude that he assumes. Naturally when they go into the grand jury room they're all on the defensive; they're under apprehension. You can't convict a man on his attitude and what may be in back of his mind. The fact is that he has made as full a disclosure as he possibly could make under the circumstances. I can't see where he has committed any contempt.

Mr. Goldschein: This will show Your Honor his attitude, and his counsel seems to think that a defiant attitude before

the grand jury is not contempt, and we think it is. It is contempt of this Court.

Here is the question on the bottom of that first page.

"Q. Will you tell us whether or not you *know* at the time you told us her name was Pat Bell that her name was
320 actually Patricia Blau?—A. I refuse to answer that question."

The Court: Well, he has corrected that by saying—

Mr. Goldschein: Yes, he corrects a lot of things. He corrects a lot of things here now when he's not under oath that he doesn't tell upstairs.

The Court: I know, but if he answers the questions here that's all he can do.

Mr. Nevans: He is not under oath at the present time.

The Court: Put him under oath then. Administer the oath to the witness.

ARTHUR BABY, being first duly sworn according to law, upon his oath testified as follows:

The Court: Now, the Government asks here: "Will you tell us whether or not you knew at the time you told us her name was Pat Bell that her name was actually Patricia Blau?"

Now, he has given you that information, hasn't he?

Mr. Goldschein: Yes, sir. I want to know what books or records of the—

The Court: Wait a minute. Then we'll cut out all that about his failure to tell you who Pat Blau was, because he has corrected that, he has purged himself on that. Now what's next?

Mr. Goldschein: Your honor, I want to know about the books and records of the Communist Party.

321 The Court: Now, it seems to me he has answered that, hasn't he?

Mr. Goldschein: No, sir. I would like him to take the wit

ness stand and I would like to question him with reference to the books and records of the Communist Party, under oath again.

The Court: This isn't before the grand jury.

Mr. Goldschein: That's right. He says he has no other books. We have evidence to the effect that there are other books. I want to question him here before Your Honor. If he wants to purge himself of the contempt of the grand jury and the defiance of the grand jury, let him take the witness stand. The grand jury wants the books and we have a right to those books.

Mr. Bary: Sir, I do not know where the books are and I can not produce the books. I can't make any other answer but that.

The Court: Mr. Bary, have you ever discussed with anybody the disposal of those books?

Mr. Bary: I haven't—I have never discussed with anybody the disposal of any books, that I can recall.

The Court: Have you had any discussion with anybody about secreting them or removing them, or anything like that?

Mr. Bary: To the best of my knowledge I do not remember ever discussing anything like that.

322 The Court: I mean irrespective of your memory, did you ever do that?

Mr. Bary: Well, we have occasion many times to get rid of a lot of material that accumulates in the office, but I don't recall, because I don't recall having seen or having had in my possession the books that are indicated here, and to the best of my knowledge—

The Court: I mean any books of your organization. Do you know where there are any books or records of your organization?

Mr. Bary: Pardon me?

The Court: Do you know where there are any books or

records of this organization that have not been produced to the grand jury?

Mr. Bary: I don't know where there are any more books than those I have already produced.

The Court: If you don't know, do you know anyone who would know?

Mr. Bary: Well, I felt that probably Pat Bell might know, but outside of that I don't know of anyone.

The Court: On your visits to her house did you discuss the books with her?

Mr. Bary: No.

The Court: Or with her husband?

Mr. Bary: No.

323 The Court: Did you ever see any books of your organization at her house?

Mr. Bary: I don't remember seeing any.

The Court: When you say "remember," what do you mean?

Mr. Bary: Well, I say I don't recall.

The Court: It might be possible and yet you don't remember?

Mr. Bary: I haven't seen any there that I can think about. It's difficult for me to answer these questions absolutely, but to the best of my knowledge I haven't seen any.

Mr. Goldschein: I think if Your Honor would turn to Kleinbord's testimony and question this witness.

The Court: All right, go ahead and read it. You may be seated, Mr. Bary.

Mr. Menin: I think on the basis of the testimony thus far submitted we have a right to a ruling.

The Court: We haven't heard all the testimony yet, Mr. Menin.

Mr. Menin: This witness isn't bound by the testimony of any other witness.

The Court: We'll decide that later.

Mr. Goldschein: He can deny he knows anything about this testimony.

Mr. Menin: We can advise ourselves without counsel's help.

The Court: Have you a copy of that testimony for me?

324 Mr. Goldschein: Yes, sir, at the beginning, the first page of his testimony, Your Honor. It's necessary to go through it all in order to be able to follow through and see just what the situation is, so the Court can grasp what the situation is.

"Q. Your name is Paul Meir Kleinbord; is that right?—A. That's correct.

"Q. And you live at 2427 Tremont Place in Denver?—A. That's right.

"Q. Mr. Kleinbord, do you hold any official position with the Communist Party of Denver?—A. I do.

"Q. What position do you hold?—A. I am the Denver—that is, the city organizer of the Communist Party.

"Q. And you job requires you to do what? What are your duties?—A. My duties are to mobilize all kinds of mass demonstrations, and so forth.

"Q. With reference to the membership is what I had reference to.—A. Well, I have the responsibility of the organization.

"Q. Of organizing members?—A. That's right.

"Q. Soliciting membership?—A. Soliciting.

"Q. When you get a new member, who do you re-
325 port that to?—A. I don't report it and I don't handle that phase of it.

"Q. Well, you solicit membership.—A. Well, in the case—that is, I personally do, yes, I personally do.

"Q. What is the procedure when you solicit membership?—A. The same, I believe, as in any other organization: you sign a card, and so forth.

"Q. You do what?—A. You sign a card.

"Q. Is that an application card?—A. An application card, yes, sir.

"Q. What does that application card look like? Do you have one wtih you?—A. No, I don't, sir.

"Q. Don't you carry them?—A. Not always. I didn't expect to recruit anybody here.

"Q. I was just about to ask you that question, but I thought maybe I'd hurt your feelings so I didn't ask you. —A. But if you wish to, I can assure you I'll make arrangements to do so.

"Q. When you get a prospect and get him to sign a card, what do you do with the card?—A. Well, I usually turn it over.

"Q. To whom?—A. Unfortunately, I haven't brought anybody into the party since I've been here.

326 "Q. Will you tell me the procedure, please, sir?—A. Well, ordinarily the procedure is—naturally, we have organizational ways of handling these things the same as any other organization does, and so the procedure would be to turn it over to another individual who is in charge of that kind of work.

"Q. How long have you been here, sir?—A. I'll have to tell you that approximately.

"Q. Yes.—A. About three years, I think, close to it.

"Q. How long have you been membership director here?—A. Well, I'm not membership director here now, sir. I'm section organizer.

"Q. How long have you been section organizer?—A. Just several weeks.

"Q. What was your duty before then?—A. I was membership director.

"Q. Membership director? How long were you membership director?—A. About nine months.

"Q. Did you get any members in those nine months?—A. We certainly did.

"Q. Now, what did you do with the membership cards when you got the membership?—A. Well, I believe
327 that is well known to the questioner. We have a way of sending these on to the New York office, naturally. There has to be a centralization of these things.

"Q. You send the card?—A. No, we don't. In fact, sir, I never see the cards myself.

"Q. What do you do with the application card?—A. The application card is usually *shdnled* by the small organization where the members are brought in and then there's another form which we call an analysis form, which has no name on it, for obvious reasons.

Q. I see.—A. And no address. It is simply an analysis of the composition, you'd say, of the individual.

"Q. What does that card look like now? Describe it.—A. What, the card.

"Q. Yes.—A. Or the form?

"Q. The form.—A. The form is a simple piece of paper that is mimeographed. It looks like a chart and it simply asks the occupation, whether the individual recruited is a member of a union. We're particularly interested in bringing in people of the working class, naturally, because we are a working class party and therefore we like to know the union affiliation—and sex, age; that's all.

"Q. Now, what do you do when that form is filled 328 out?—A. The form remains here.

"Q. Where?—A. In our folders, among our records.

"Q. Among your records?—A. That's right.

"Q. Who keeps that?—A. Well, you usually find them in the office in the file.

"Q. That is part of your job, attending to those cards, isn't it?—A. Well, it used to be, yes.

"Q. Until three weeks ago?—A. That's right.

"Q. Now, who else handled those cards other than you?—A. Of course—are you asking me for individuals, sir?

"Q. Yes.—A. Well, in that case, sir, I feel that I cannot make statements in this respect because I feel it is incriminatory.

"Q. What is incriminatory?—A. To make statements in regard to other individuals. I feel that I want to answer questions here honestly about myself, as I have, questions pertaining directly to myself, but I feel that other questions *pertaining* to other individuals are incriminatory.

"Q. Well, let me explain the law to you. If I ask you any question that may incriminate you for the violation of

any offense against the United States Government, you
329 are then privileged to refuse to answer and base it on the ground that it may incriminate you. You can't refuse to answer any question that may incriminate someone else. The privilege is personal to you and does not cover anyone else other than you.—A. I understand that, sir.

"Q. Now, therefore, you must answer the question pertaining to other people. Now, who else other than you handled those membership forms?—A. Well, I just want to say this, that even according to what, the way you explained that law, I feel that personally according to my principles, my political convictions, that that would be incrimination, because that would be incrimination against myself, because my political convictions are such that I feel sitting here I can't, because of the situation, incriminate—that is, name other people.

"Q. Do you mean, Mr. Kleinbord, that if you tell me or tell this Grand Jury who else in addition to you works on those membership forms, that giving that name may incriminate you for the *violation* of a Federal offense?—A. I could name one such person. I mean, the situation is—you know, these things are fluid. As I said—

"Q. Let's get down to basic things.—A. All right,
330 I'll name one person.

"Q. All right, go ahead.—A. Art Bary, for example, handles such forms.

"Q. All right. Who else other than Art Bary?—A. I said I would name one person.

"Q. All right now, who else?—A. At the present time, no one.

"Q. Who has handled them?—A. I don't know.

"Q. Do you know Pat Bell?—A. Do I know Pat Bell? Yes, I know Pat Bell.

"Q. Who is she married to?—A. I don't know very much about her, sir.

"Q. What is her married name?—A. I can't remember.

"Q. Pat Blau, isn't it?—A. Possibly; I think so, yes, sir.

"Q. They call her Pat for short; her name is Patricia?—A. That's right.

"Q. Her husband is Irving Blau, isn't it?—A. I don't know him too well, sir.

"Q. Well, you don't have to know him too well to know his name is Irving Blau, do you?—A. I mean I know him so incidentally I couldn't exactly remember. I think
331 you're right, though.

"Q. Now, she is secretary of the Communist Party, isn't she?—A. Secretary of the Communist Party.

"Q. Of Denver?—A. No.

"Q. Or is treasurer?—A. No, she's not, sir. I am.

"Q. You are what?—A. I am. I said I was the Denver organizer. That makes me the Denver secretary of the Communist Party.

"Q. Oh, I see; you are?—A. Yes.

"Q. And what is she, treasurer?—A. I'm sorry, sir. I can't give you any information about her.

"Q. You can't?—A. No.

"Q. Now, who collects the dues in your party?—A. Up until recently I was doing that.

"Q. How did you keep *tract* of it?—A. Through records.

"Q. Well, what records did you keep? How?—A. We have dues forms. I believe you've seen them; I'm certain that you have.

"Q. Dues forms?—A. Certainly.

"Q. Have you produced one up here?—A. No. I
332 had no idea I was—I didn't know why I was asked here, sir.

"Q. Then why do you say I have seen one?—A. Well, it seems to me that many of these things you are asking are well known.

"Q. You never have shown me, have you?—A. No.

"Q. And you have never seen me with them?—A. No.

"Q. And I have never seen them.—A. I'm sorry. We have a dues form.

"Q. Do you keep a record in a book of the amount of dues paid by each member?—A. Yes, sir.

"Q. How do you keep that?—A. Well—

"Q. What kind of record; do you keep a record of the membership dues?—A. Well, it may seem slightly difficult to understand, but I can explain that. Even though I kept records of dues forms, there were no names because the way we work it out is that in some cases there are simply letters, you know, the letters of the first name of an individual.

"Q. Yes.—A. And so forth. That's a simple kind
333 of identification.

"Q. Or a card number?—A. No, sir.

"Q. Well, how do you keep a record of that?—A. Well, there are dues stamps. You know how they keep it in a union.

"Q. No. You don't have any information in your book how many dues stamps each member has?—A. Sure.

"Q. How do you keep track of it?—A. Because we have—just as there is in a union, there are stamps issued, ten cent stamps a month for unemployed.

"Q. And thirty-five cents?—A. Thirty-five cents. That's in the wage scale and according to the amount of money that people earn, that's how much they pay, and it's a very minimum amount per month. And so every time they pay dues they get a stamp similar to a union. Each person—if anyone here has been in a union they know that's the way it's done.

"Q. All right, now if a man doesn't show up at the meetings and leaves his card at home and somebody tells you that he is three months behind, can you look at your record and show he is three months behind?—A. Well, I wish our records were that good, you know, but we don't—

"Q. Generally, can you do that?—A. In some
334 cases, perhaps, yes.

"Q. Well, just tell us how you do it. That's exactly what I'm asking you.—A. Well, in some cases if I could identify by the initials some person that way I'd know that that person is in arrears, yes.

"Q. How? What record do you keep with an initial on it?—A. The record.

"Q. Do you keep a book?—A. Certainly.

"Q. What does the book look like?—A. It's a simple record book, just made up in the national office of the Communist Party. It is a very simplified bookkeeping system that actually covers what has to be covered so that it can be handled by someone like me who knows nothing about bookkeeping.

"Q. Just how is it done? Describe it for us.—A. Describe it?

"Q. We're not bookkeepers.—A. I don't know anything about bookkeeping; neither am I. That's the difficulty.

"Q. Well, you keep them; we don't. What is it
335 like?—A. There are basically two forms; one is a cash receipt form and everything is in duplicate, and the other is a cash paid form. The cash receipt form is what you naturally take in and that's itemized and totaled on the bottom.

"Q. Totaled on the bottom? How big a book is it? Is it as big as this, six by ten?—A. Well, I'd say it's a little shorter and a little wider.

"Q. A little shorter? You'd say about eight by eight?—A. Well, all right, eight by ten, something like that.

"Q. Ten inches wide and eight inches long?—A. That's right.

"Q. And the first page is ruled, the pages are ruled?—A. The pages are ruled.

"Q. Now, does it have an alphabetic index on it? Is it alphabetical like this?—A. Oh, no, nothing like that.

"Q. It isn't alphabetical at all?—A. No, it's a record book where you simply have duplicate sheets for cash intake and cash output.

"Q. All right; if Joe Doakes pays you $3.00 for advance dues, how do you list Joe Doakes in this book?—A. Well, the records I've taken in don't list Joe Doakes; it only lists organizations—that is, it only lists the branches.

"Q. Yes.—A. The branches.

"Q. All right.—A. That's the only time—

336 "Q. I'm not interested in that. Let's get back to the individual member. How do you keep track? What does your book show with reference to Joe Doakes having paid you $3.00 for dues in advance?—A. How do you mean, how does the book show that?

"Q. How does your book appear? What entry do you make on the books to show that Joe Doakes paid you $3.00?—A. I make no such entry, sir.

"Q. Who does make an entry?—A. Anyone who made that, who takes the dues from him makes that kind of an entry.

"Q. Now, wait a minute. Anybody would be who? Does everybody collect dues?—A. No, specific people.

"Q. Who collects dues now?—A. The membership, the directors of the parties collect dues.

"Q. Who is that?—A. As I said before, I feel that I can't answer such questions, and I'd like to explain here why.

"Q. Well, will it incriminate you for the violation of a Federal offense?—A. I feel that—

"Q. Will it incriminate you for the violation of a Federal offense?—A. It incriminates my principles.

337 "Q. Will it incriminate you? Incriminate means that it will make you responsible for the violation of a Federal statute.—A. I don't want to be held responsible in regard—

"Q. You are not held responsible for anything other than a violation.—A. Myself.

"Q. —of the Federal law. Have you violated any Federal law?—A. I have not, sir.

"Q. Then you must answer the question. Now, who collects those dues now?—A. I mentioned one such person.

"Q. Bary?—A. That's right.

"Q. Pat Bell?—A. I said that I didn't know.

"Q. All right, now, who is that other one? Who else collects dues?—A. Well, there was a period when Jane Rogers did.

"Q. All right.—A. All right.

"Q. Now, who does it now?—A. Now, that's what we haven't worked out. As I said, I had charge of this work.

"Q. Mr. Kleinbord, who collects dues now?—A. I

338 said I don't—we haven't worked that out yet.

"Q. Oh, yes, you did. You told us that Bary, and you didn't want to mention the name of the other.—A. Oh, yes, that's right.

"Q. Now, who is the other?—A. I say that Bary—

"Q. Who is the other, other than Bary?—A. There is none, at the present time, sir.

"Q. Didn't you tell us there was one other than Bary?—A. I said Jane Rogers u d to.

"Q. No, that wasn't my question and you didn't make that answer.—A. What are you trying to ask?

"Q. I asked you who collects dues now. You said Bary does now.—A. That's right.

"Q. I said who else you said you didn't want to mention it, the name of the other one. Who collects dues now?—A. Oh, no, no. That's not what I meant. I'm sorry. I said I didn't

want to mention any other names in general. That's the point. But as far as who is collecting dues now, we just simply haven't settled that thing.

"Q. How long since you were the membership director collecting dues? Three weeks, I believe you said, wasn't it?—A. It's three weeks since we made the change. That's
339 approximately it, yes.

"Q. Up until three weeks ago who was collecting dues?—A. I was.

"Q. Was anybody else other than you?—A. No, I was in charge of that.

"Q. Did anybody else other than you collect dues?—A. No, I was in charge of that.

"Q. Now, when Joe Doakes—I'm using Joe Doakes as a name—paid dues, what entry did you make in this book you were speaking of?—A. I think I already explained that.

"Q. Well, please do it again. I didn't get it. What entry did you make in the book to show that Joe Doakes paid three dollars dues in advance?—A. I say that there are initials there.

"Q. What do you put, J.D. for Joe Doakes?—A. Right; J.D. for Joe Doakes. He gets a stamp in return.

"Q. And you would put "$3.00" opposite his name; is that right?—A. That's right.

"Q. And would you use anything else other than initials? would you use code names?—A. Oh, no.

"Q. You didn't use anything like that?—A. No.

"Q. The only thing you used then was initials?—
340 A. The only reason why we used initials is because people like myself who are working people might lose their jobs on account of this kind of publicity; that's all.

"Q. Yes. Now, if you get any publicity on this it's because you wouldn't bring them into the grand jury and show them here. Now, what transpires in this grand jury room is secret, and we've tried to get you all to bring those books in here and show them to the grand jury.—A. I wasn't asked to do so, sir.

"Q. Well, we're asking you now to get that book in which you keep the payments of dues, the lists of payment of dues from the membership and *anyway* that you designate the members in those books. I want you to bring that book in. Will you do that?—A. Will I do that? I feel, sir, that I need

counsel of law on that question. I don't know. I don't know if I can answer that directly because I don't have—I'm not the only one that has responsibility for these things. I'd like to make that clear.

"Q. I know, but you're responsible for those books.—A. But I'm not the only one that has it.

"Q. I'm not interested in who else. You're on the witness stand.—A. Therefore I can't go ahead and do these things by myself.

341 "Q. When was the last time you made an entry in those books?—A. Probably a month ago.

"Q. Now, where are those forms, membership forms, that you talk of?—A. You mean the analysis sheets?

"Q. The forms in which you get the details of all the qualifications and background of the members, as you just described on that witness chair.—A. Where are they? We keep them in our office.

"Q. Under whose supervision? They're under yours until somebody else is designated, aren't they?—A. Not only under mine; under Mr. Bary's too.

"Q. Mr. Bary's too, but you as the membership director are personally responsible for those books and are responsible to him?—A. I used to be, yes.

"Q. Well, you haven't turned them over to anybody yet, have you?—A. That's right.

"Q. And you're still responsible until you turn them over?—A. That's why I feel it isn't only my responsibility, because this change must be made.

"Q. Now, Mr. *Kelejnbord*, the grand jury wants you to bring in before this grand jury all the membership forms that you have in your office, together with this mem-

342 bership dues book that you just described here.—A. I'll be very happy to do it.

"Q. Bring it forthwith.—A. Right now? Now?

"Q. Yes. We're waiting here for you.—A. All right. I would just simply like to point out that we have nothing to keep secret, sir.

"Q. I don't think you have, but you seem reluctant to bring it in here. Now, if you don't have anything to hide—and I don't think you have—get those books and bring them in here and let's get that issue over with. Now, we will recess you and you go get those books and come right back.

(Whereupon, a short recess was taken.)

"Q. Mr. Kleinbord recailed. Mr. Kleinbord, do you have with you that book that you described as containing the amount of dues paid by each of the members of the Communist Party?—A. I do not.

"Q. Why don't you have it?—A. I went and I looked and all I came back with was what I could find. I brought back some material here, stuff I was trying to describe that you asked me for, but I couldn't find the others.

"Q. Now, what explanation do you have for it?—A. What explanation do I have?

"Q. Yes, sir.—A. I simply couldn't find them.

343 "Q. You are the membership chairman, aren't you?—A. I am not.

"Q. You are responsible for them, aren't you?—A. I am not.

"Q. Sir?—A. I am not.

"Q. Aren't you responsible until another one is designated?—A. I have a new responsibility and there's plenty of work attached to that.

"Q. Did you discuss that list with anyone?—A. What list?

"Q. That book containing the membership dues?—A. Did I discuss it with anyone?

"Q. With anyone, yes, sir.—A. No, sir.

"Q. With no one at all?—A. No, sir.

"Q. Did you mention it to anyone?—A. No, sir.

"Q. Did you call anyone?—A. I'd like to point out, sir, that I've kept my part of this hearing but I see that you haven't. Here it is, and that's precisely why I can't.

"Q. Here is what? What is that?—A. This is

344 supposed to be a directory, according to the Denver Post.

"Q. Well, what is it? What are you showing me?—A. I'm showing you an article here by Robert Cour which talks about what's going on in these hearings.

"Mr. Lilly: We haven't seen it.—A. Here it is.

"Mr. Lilly: We don't dictate the policy of the newspapers.

"Q. (By Mr. Goldschein) Let's get back to that.—A. That's the second story of another edition.

"Q. Are you talking about this headline here? This is something that took place in the open court room downstairs. —A. It talks about the federal grand jury right there in the first paragraph.

"Q. Of course, everybody in town knows the grand jury is in session.—A. This story is in relation to what happens here.

"Q. We're not responsible for what appears in the paper, and they did not get it from us. Will you tell us about that book containing the dues of your party membership?—A. I've told you everything I know, sir.

"Q. Did you talk to anyone on the telephone about it?—A. No, sir.

"Q. Sir?—A. When do you mean?

345 "Q. Well, now, when did you talk to anybody about it?—A. I've talked to people on the telephone all my life. Now I don't know what you mean.

"Q. About that book.—A. Since I left here, of course not.

"Q. Did you talk to anybody about it today?—A. No, sir.

"Q. You didn't mention the book to anybody?—A. No, sir.

"Q. Nor did anybody mention it to you?—A. No, sir.

"Q. How about those membership forms that were filled out?—A. I told you I'd look for them, and I couldn't find them.

"Q. When was the last time you saw them?—A. So I brought a form here to show you what they're like.

"Q. We're interested in the forms that were filled out. Where are they?—A. I have no idea.

"Q. When was the last time you worked on them?—A. About a month ago.

"Q. Sir?—A. About a month ago.

"Q. And where are they, or where were they then?—A. As far as I know, they were in the office. That's where they were.

"Q. Where is that office?—A. The office of the

346 Communist Party is at 929 17th *Stret*.

"Q. And that's where you saw them?—A. That's right.

"Q. And that's where you were working on them?—A. That's right.

"Q. Now, have you worked on them since?—A. No, sir.

"Q. Has anybody else worked on them since?—A. Not that I know of.

"Q. Have you discussed them with anybody?—A. No, sir.

"Q. Did anybody mention them to you?—A. No.

"Q. Did you meet anybody after you left this room, that you knew, that you talked to?—A. No, sir. The only person I talked to was the news boy when I picked that up.

"Q. Did you talk to Art Bary?—A. Down the hall I saw him, down the hall, yes, sir.

"Q. Did you discuss those forms with him?—A. No, sir.

"Q. Was anybody in the office there when you went in?—A. What did you say?

"Q. Was anybody in the office there when you went in to look after you left the grand jury today?—A. There was no one there when I went in.

347 "Q. Do you have a key?—A. I have a key.

"Q. Was that the first time you were there today?—A. Yes, sir.

"Q. Were you there yesterday?—A. No, sir.

"Q. When was the last time you were there before today?—A. Oh, I usually drop in there a number of times a week. I might have been there the day before or a couple days ago. I don't make a habit of coming in.

"Q. Did you discuss the books or records with anyone at that time?—A. No, sir.

Q. You did not?—A. No, sir.

"Q. Did you see Pat Bell there at any time last week?—A. No, sir; I haven't seen her for a long time.

"Q. When you were there last week who was there?—A. Well, the only time I remember going in there last week was to pick up some pieces of literature that I wanted to get hold of for myself. That was after work and there was no one there but an old fellow that occasionally goes in there and sweeps up the place.

Q. When was that?—A. Well, I'd have to make

348 a rough guess. I don't remember. It was at least four or five days ago.

"Q. Now, when was it you were there before that?—A. Oh, I don't know. As I say, I go in there from time to time. I wouldn't distinctly remember.

"Q. When was the last time you saw Bary there?—A. The last time I saw Bary there was—I don't know. It's a matter of weeks, I'd say, several weeks.

"Q. You were talking to Bary down the hall here right outside the grand jury room?—A. No, sir.

"Q. What?—A. What was that question again?

"Q. You talked to Bary in the hall here?—A. Oh, yes.

"Q. Outside the grand jury room?—A. That's right, yes.

"Q. What was your conversation with him then?—A. Nothing. I just—he asked me if I'd been called in here and I said yes, and he said OK. That's all.

"Q. Did he ask you anything about the books and records?—A. No, sir. I asked him how he was feeling. He's a very sick man.

"Q. What conversation did you have with Mrs. Rogers that was in here?—A. She was in the other room and she was explaining the circumstances of what occured this

349 morning.

"Q. What did she tell you?—A. She simply told me that she had been cited in the other court and that she hated like the devil to stay overnight and she wished something could be done that she could get home to the kids; that's all.

"Q. Did she say anything about the books or records?—A. No, sir, not a word.

"Q. She didn't mention books or records to you at all?—A. No, sir.

"Q. She didn't tell you who had them?—A. No, sir.

"Q. Did Miss Wertheimer say anything to you?—A. No; I didn't speak to her.

"Q. You didn't talk to her at all?—A. Oh, I don't know; I might have in passing. I guess I might have in passing. They were both sitting there together.

"Q. You were standing there talking to her when I passed down the hall, weren't you?—A. I guess—I said I might

have in passing. The two of them were sitting there together.

"W. I was the one that was passing. You were the one that was standing there talking to her, weren't you?—
350 A. I was talking to Jane particularly. I suppose that the three of us got into a conversation, yes.

"Q. What did Miss Wertheimer have to say about the books?—A. About the books?

"Q. Yes.—A. Not a thing.

"Q. She didn't say anything about them to you at all?—A. No, sir.

"Q. Who has charge of these offices of the Communist Party of Denver now?—A. How do you mean, who has charge of them?

"Q. Simply that. Who has charge of the offices?—A. Well, if you mean who stays there, no one does during the day.

"Q. Who is responsible for the offices?—A. Well, as far as responsibility goes, it's just Art and myself when we're in and out of the place.

"Q. Anybody other than you and Art? You mean Art Bary?—A. That's right.

"Q. Just you and he? Does anybody else have access to the books and records other than you and he?—A. I believe not.

"Q. Where are they kept?—A. They have always been kept in the office, as I said.

"Q. Now, where in the office?—A. We have a file.
351 We have a metal file. That's where I went to look for them.

"Q. Is that metal file locked?—A. No, it's always open.

"Q. Does everybody know where those files are kept?—A. I imagine anyone who comes in there would know, yes.

"Q. How would they know?—A. I mean anybody who would be around the office, if they looked around would certainly find them.

"Q. And you have just one filing cabinet?—A. That's all.

"Q. And it was in that filing cabinet the last time you saw it?—A. That's right.

"Q. And it isn't there now, you say?—A. It certainly is not.

"Q. All right, sir; be back here tomorrow morning at nine-

thirty o'clock.—A. Very good. You want me to leave these with you?

"Q. What are these papers?—A. This is a form that I was trying to describe. I don't know how well I did it. And this is the other form that I was trying to describe also.

"Mr. Goldschein: Will you mark this 'Weekly Dues Report' as Exhibit No. D?

352 (Whereupon a document was marked Grand Jury Exhibit D for identification.)

"A Juror: Just one question. Were any other persons at liberty to go in that office, or do they have keys to get in any time?—A. Well, the situation was such—

"Q. Other than you and Mr. Bary?—A. I think there must be some other keys around, yes. I've heard that there are some, from the past, when I wasn't there.

"Q. I wondered if it was a public office.—A. It's more or less of a public thoroughfare. That's what it is. We keep some literature there. That's what it is mainly, books and things, and I think people who have access to it go in there and help themselves.

"Q. But you do have keys?—A. Yes. I imagine there are a number of keys floating around here, yes.

"Q. You wouldn't know who has those other keys?—A. No, I don't. In fact, I wish I knew. I asked that same question a few weeks ago.

"Q. Wouldn't it be wise to put a lock on there?—A. Well, it isn't our building.

"Q. If you're responsible you ought to know who has the other keys. The owner of the building should know.—A. Well, we don't have anything valuable in there, actually.

353 "Q. Do you suppose your papers disappeared with Pat?—A. I don't know.

"Q. (By Mr. Goldschein) This card that you handed me, that is divided into three sections?—A. Yes, sir.

"Q. Headed 'Preamble.' That is one of the cards that you brought with you?—A. Yes.

"Q. Now, will you mark that as Exhibit E to the testimony of Kleinbord, please?

(Whereupon, a document was marked Grand Jury Exhibit E for identification.)

"A. That top card is the preamble to the constitution of the Communist Party of the United States. The center part is the actual application card, and the third part is a yearly subscription to our press.

"Q. What do you do with the lower part here which says, 'I wish to subscribe to the Worker'? What do you do with that?—A. That is merely a subscription blank to send in to the newspaper.

"Q. What do you do with the application for membership, the upper part, 'Communist Party of the United States'? Do you keep that in your files?—A. The center part?

354 "Q. Yes.—A. No, sir, we do not.

"Q. What do you do with that?—A. As I explained previously, that is usually—I've never seen one of those around here. What we do is transfer verbally the information to the other sheet that I just brought in. That's what that other sheet is for.

"Q. What do you do with this card here?—A. I say I've never—all I have in the office there are the empty ones. There are several hundred of them. That center part is never given to me, never.

"Q. You have the same information contained on that Exhibit D that you brought?—A. With the exception of names and addresses. I never get that information.

"Q. You put the initials on?—A. Even at that—no, sir. If you look at that, study that analysis sheet closely, there's no place for initials or anything of the kind.

"Q. Regardless of whether or not there is a place up here for initials, do you put initials on there so you will know?—A. No, I don't.

"Q. How can you tell who this particular sheet is supposed to be for?—A. Well, I actually can't tell. That's the

355 point, and that's not my purpose in filling this out. I can't tell; I can't tell. Now, the point is that it's a matter of individual contact with people, that's all it is, and I can't possibly be in a position to know all that; that's all.

"Q. The occupation list means what?—A. Well, that would mean the general—the trade that they're in, that's all.

"Q. That is a summary?—A. For example, I'm a machinist so it would say machinist there, and the next column

says number. That would be one—one machinist. The union that I'm in, if I were in a union I'd—

"Q. Where did you get that information from?—A. That information would be turned over by the person who has charge, or who has actual contact with the individual they're speaking of.

"Q. How do they get it to you? In written form?—A. No; verbally.

"Q. How do they get it to you verbally? Who do you contact? Who gives you that information?—A. Who?

"Q. Yes.—A. The individual that's getting the application card filled out.

"Q. The individual who fills out the application card?—A. The member who has gotten the application card.

356 "Q. The solicitor?—A. That's right.

"Q. Who was the solicitor?—A. Say if I were soliciting a membership right here, in that case I would be in a position of knowing exactly your name and address and everything else, if that were the case.

"Q. All right.—A. But say that you were soliciting membership.

"Q. Yes.—A. Well, I would never then be in a position to know who the person was, actually, name or address, whom you have solicited, because it wouldn't be turned in to me on that center card I just showed you.

"Q. It would be turned in on this?—A. It would not be turned in on that, not to me.

"Q. Well——A. We don't use it.

"Q. How do you know who your members are?—A. The only way we can know is by getting that sheet and have it filled with the names and addresses.

"Q. This?—A. That's right.

"Q. This doesn't tell you who the membership is, does it?—A. That's what I've been trying to say here all the time. I don't know. In the majority of cases I just don't

357 know.

"Q. You mean you don't know from that list?—A. That's right.

"Q. But you do know who the membership is?—A. Sooner or later I get to know, sure.

"Q. And that membership list, of course, is contained in the dues collected?—A. No, sir.

"Q. In the book?—A. No, sir.

"Q. Well——A. I mean, as I said, there would be initials of people.

"Q. That's the book we want to see.—A. That's the book I just couldn't find.

"Q. All right, we'll recess you until tomorrow morning at nine-thirty.—A. Thank you.

(Witness excused.)

"(Whereupon, a recess was taken until 9:30 a.m. September 22, 1948.)"

358 The Court: I don't see anything in there, Mr. Goldschein.

Mr. Goldschein: Well, Your Honor, the whole things is contumacious. The witness doesn't have a membership list, he does have a membership list; he keeps the names, he doesn't keep the names; he keeps the initials; where are the papers with the initials; we haven't got the papers with the initials; they disappeared. His whole attitude is willful and obstructive. The fact that he says he went to get them and hasn't got them isn't conclusive. What is his whole attitude in that statement? I read the whole testimony.

The Court: I know, but we can't adopt his attitude. There isn't a question in there that he didn't answer, and the burden is on you, it seems to me, and not upon him.

Mr. Goldschein: That's right, and we are assuming the burden, Your Honor. His refusal to name other people who collect dues, other than Bary; his refusal—

The Court: Where did he make that statement? I didn't see that.

Mr. Menin: He has indicated that to the best of his knowledge it was Bary, and I think he mentioned one other name at some previous time—Mrs. Rogers; that he doesn't know of any other name.

The Court: It is very evidently a very loose organization and they don't keep many records, for what purpose I don't know.

359 Mr. Goldschein: He first said, may it please Your Honor, that he will not mention any names of other people who worked with him in the collection of dues. He said he will not answer the question. He stood on his constitutional rights. When he was advised that his constitutional right didn't apply to any naming of other people he said that he refused to answer because of a personal privilege. He then said, "All right, I'll tell you."

The Court: Where is that? What page? Where is that on that personal privilege?

Mr. Menin: If the Court please, first of all—

The Court: Mr. Menin, just a minute.

Mr. Menin: We are considering Mr. Bary now.

The Court: Just a minute, please. What page did his examination begin on? They evidently don't keep any financial accounts because they give these stamps as receipts.

Mr. Goldschein: Yes, they do. They keep financial accounts. They keep a record of all the dues paid by all the members.

The Court: Where is your evidence of that?

Mr. Goldschein: Right in there. He said that he keeps it. Instead of putting the name of the individual down—

The Court: He puts an initial.

Mr. Goldschein: He puts an initial.

The Court: And the man who pays the money gets a stamp.

360 Mr. Goldschein: That's right. Now I want the books with the initials in it. That's what the grand jury wants. We want the book with the initials of the membership and the amount of dues they paid and when they paid it. That's what we want and they have that record.

The Court: Where is it shown in here that he has it?

Mr. Menin: If the Court please, he said he would look for the record.

The Court: Just a minute. I'll give you an opportunity to be heard. Just be quiet, Mr. Menin. He says it isn't his business to look after these files now or attend to the cards.

Mr. Goldschein: On page 80, may it please Your Honor, half way down or three-quarters of the way down, the question is:

"Now, who else handles these cards other than you?—A. Of course—are you asking me for individuals, sir?

"A. Yes.—A. Well, in that case, sir, I feel that I cannot make statements in this respect because I feel it is incriminatory.

"Q. What is incriminatory?—A. To make statements in regard to other individuals. I feel that I want to answer questions here honestly about myself, as I have, questions pertaining directly to myself, but I feel that other questions pertaining to other individuals are incriminatory."

361 Now that refusal, may it please Your Honor, follows all the way through, and he finally weasels his way out by saying, "I don't remember." Now, a man who doesn't remember doesn't say, "I refuse to answer on the ground that it may incriminate me." He doesn't say that "I don't want to incriminate other people." He says, "I don't know." But when he starts off with "I don't want to name other people—"

The Court: That is Mr. Kleinbord?

Mr. Goldschein: That's right.

The Court: Mr. Kleinbord isn't before us today. He isn't here.

Mr. Goldschein: Yes, sir, he's right here. He's the second man coming up.

The Court: We're considering Mr. Barry's case.

Mr. Goldschein: We are asking Your Honor to consider them altogether, because we've got to take their answers together. They operate together, they have access to the same offices, one tosses it to the other, and unless you

handle them toegther we're never going to know where we are on this.

Mr. Menin: Now, if the Court please—

The Court: Just a minute, Mr. Menin? Will you please be seated?

Mr. Menin: May I answer the remark made by counsel?

The Court: Just a minute. Will you be seated, please? I'll give you an opportunity. I think there may be some explanation necessary to that answer on page 80.

362 Mr. Goldschein: May it please Your Honor, I'm winded and exhausted. Mr. Nevans is familiar with it. I would like to request that he be permitted to continue.

The Court: All right.

Mr. Nevans: If I may, if the Court please, I would just like to outline briefly the various questions and answers which we believe Mr. Bary deliberately refused to answer and which now he has changed his position on.

The Court: What are they?

Mr. Nevans: First I call Your Honor's attention to this matter of Pat Bell's other name, if she has another name. Now I would like to point out to the Court—

The Court: Nobody here has testified that she had another name.

Mr. Nevans: I beg your pardon?

The Court: You have no information that she has any other name.

Mr. Nevans: The man comes in this morning with a complete change in attitude and says since he has been before the grand jury he finds her name is now Pat Blau.

Mr. Bary: I was in this court room yesterday and I heard that established.

The Court: Just a minute. Mr. Bary, you'll have an opportunity to be heard.

Mr. Bary: I'm sorry.

363 Mr. Nevans: I'd like to point this out to the Court, that when he was asked, "Do you know Pat Bell by any other name?" he did not say, "No, I do not." He did not say he did know her only by Pat Bell, but this is what he said:

"Q. Now, will you tell us what other name you know Pat Bell by?"

The Court: What page are you reading from?

Mr. Nevans: I'm reading from page 28.

The Court: All right.

Mr. Nevans: "Q. Now, will you tell us what other name you know Pat Bell by?—A. I'd rather not answer that question."

He did not say, "I don't know her by any other name," or "I know her only by the name of Pat Bell;" he said, "I would rather not answer that question."

"Q. What objection do you have?—A. I just don't wish to answer."

The Court: I know, but now he has cleared that up this morning and told us that her name was Mrs. Blau.

Mr. Nevans: This was testimony, if the Court please, on the twenty-first. The grand jury has been in session the twenty-first, the twenty-second, the twenty-third. They came into court this morning and reported that because of the—

The Court: I understand all that, but he has given you this information now, hasn't he?

364 Mr. Nevans: Finally, after he's cited before you.

The Court: Then you've got what you want, haven't you? It doesn't make any difference if it took you three or four days to get it.

Mr. Nevans: No, sir; the grand jury has recessed because of the attitude of men such as he. He deliberately defied the grand jury on that date. Now he comes before

Your Honor; he does not testify under oath; he said since then he has learned her name is Blau.

The Court: That's the information you were seeking, isn't it?

Mr. Nevans: And I seriously question that statement this morning that he has just *learned* that. But to proceed to the next point, on the books and records. I believe that is quite interesting. That's on page 29.

"Q. Now, when was the last time you discussed those books and records of the Communist Party with anybody, Mr. Bary?—A. I don't recall.

"Q. Did you discuss them with anybody today?—A. Today?

"Q. Yes, sir, outside of this grand jury room."

The Court: What page are you talking about, 29?

Mr. Nevans: Yes, sir, page 29 and 30.

The Court: He said the last time he saw them they were in the office of the Communist Party.

365 Mr. Nevans: Yes, sir. On page 29:

"Q. Now, when was the last time you discussed those books and records of the Communist Party with anybody, Mr. Bary?—A. I don't recall.

"Q. Did you discuss them with anybody today?—A. Today?

"Q. Yes, sir, outside of this grand jury room.—A. I don't recall.

"Q. It is *not* five minutes after two, Mr. Bary, and you left this grand jury room at approximately eleven o'clock this morning. Can you recall from eleven o'clock this morning until two o'clock, this time, this afternoon, whether or not you discussed the books and records of the Communist Party with anyone?—A. I refuse to answer on the ground it might incriminate me."

A change of answer. He now states that he does, or he infers that he does recall having had such a conversation, but he now refuses to answer because it might incriminate him. That is a matter to be determined by the Court, and that matter has not been cleared up *up* to this time.

The Court: All right.

Mr. Nevans: *Proceedings* to the next point, there is more about Pat Blau here which the Court apparently does not wish to hear further.

The Court: Now, Mr. Bary.

Mr. Bary: Yes, sir.

366 Mr. Nevans: There is one other matter.

The Court: Just a minute. I would like to ask something. Do you care to answer that question?

Mr. Bary: Yes, sir.

The Court: What?

Mr. Bary: Sure.

The Court: The question is: "It is now five minutes after two, Mr. Bary, and you left this grand jury room at approximately eleven o'clock this morning. Can you recall from eleven o'clock this morning until two o'clock, this time, this afternoon, whether or not you discussed the books and records of the Communist Party with anyone?"

Do you care to answer that question?

Mr. Bary: Yes, I would like to answer that question.

The Court: What?

Mr. Bary: I would like to answer that.

The Court: Go ahead.

Mr. Bary: And I would like to explain why I answered in the way that I did, if that is proper.

The Court: Just give your answer. I don't care for an explanation.

Mr. Bary: Well, I did discuss this with my attorney, and when I was being questioned I didn't know just what my—I couldn't recall whether I had, and then when I finally determined that I felt that I shouldn't answer it because I didn't know what my rights were.

367 The Court: Do you want to answer it now?

Mr. Bary: Well, I think I have answered it.

The Court: What was the answer?

(The answer referred to was read by the reporter.)

The Court: Then he has answered that.

Mr. Nevans: It is our position that he has not. If the Court will recall in the transcript that on another matter where he was asked to answer a question he stated that it was a privileged communication between counsel and himself.

The Court: That's true, isn't it?

Mr. Nevans: Quite true, yes, sir, but here in this same transcript on the same day, at the same time, he is being questioned, he was fully familiar with the privilege of a confidential communication between attorney and client, but he doesn't give that reply to the grand jury on this question. He says, "I refuse to answer because it might incriminate me."

He doesn't claim privilege which he claimed at another time.

The Court: No, but now he has waived his privilege and he has answered the question and told you the only person he discussed that with was Mr. Menin, his counsel. Now doesn't that purge him of that particular contempt?

Mr. Nevans: If the Court believes so, yes, sir.

The Court: All right; unless you have some authority to the contrary I think it does.

368 Mr. Nevans: Now one other matter here.

"Q. The books and records are kept under your direction, aren't they?"

This is on page 34.

The Court: All right.

Mr. Nevans: "Q. The books and records are kept under your direction, aren't they, as chairman or president of the organization?—A. I suppose so.

"Q. Will you produce those books and records?—A. I will have to have an opportunity to discuss with counsel and I will answer that question, sir."

Now, it hasn't been answered to the satisfaction of the grand jury that he has produced all books and records of the Communist Party of the State of Colorado which he has in his possession, nor has it been answered to the satisfaction of the grand jury that he has stated to them in whose possession any other records of the Communist Party of the State of Colorado, in whose custody such records are. We would like to have that matter cleared up.

Mr. Menin: I would like to have the question and the answer. It seems to me that the question was answered to the best of his ability at that time. Counsel is asking for something that he didn't ask for in the grand jury room.

369 Mr. Nevans: The grand jury has been recessed, if the Court please. We would like to have taken Mr. Bary, had we known of this radical change of attitude on his part, from an attitude of complete defiance to an attitude of subjection, subservient to the Court—

Mr. Menin: Your Honor, he's got that right to change his position. Hasn't he answered the questions now? That's all he can ask for.

Mr. Nevans: But the grand jury has been frustrated by his defiant attitude before.

The Court: I know, but you've got the answers now. It doesn't make any difference whether he goes up before the grand jury and repeats them there.

Mr. Nevans: All right. Then just two other matters, if the Court please. The matter of membership of the Communist organization is one.

The Court: All right; what page is that?

Mr. Nevans: That is page 60.

"Q. Approximately how many members do you have in Denver, Mr. Bary?—A. I would rather not answer that, sir."

The Court: Where is that?

Mr. Nevans: That is on page 60, if the Court please.

The Court: All right.

Mr. Nevans: "A. I would rather not answer that, sir.

"Q. Well, can you just give us a rough idea? I don't want it exact.—A. Well, there are various estimates.

370 The FBI estimates two thousand.

"Q. Now, just a minute. I'm not interested in any smart answers. I havent' given you any.—A. I haven't given you any either. I told you I'd rather not answer that question."

The Court: Is that all he has to say about it?

Mr. Nevans: Yes, sir.

The Court: What do you say to that now, Mr. Bary?

Mr. Nevans: There are two more questions I would like to read on that question. Page 62:

"A. You asked me how many members there were. I told you I would rather not answer that question.

"Q. Is it because you don't know or don't want to tell us?—A. I may be wrong in giving you the number and I would be open to perjury on one hand, and secondly I don't believe that I would care to reveal the amount that I think we have."

"Q. Well, can you give us your best estimate?"

The Court: What do you mean, the amount they have? The number of members?

Mr. Nevans: Yes, sir.

"Q. (By Mr. Goldschein) Well, can you give us your best estimate?—A. I would rather not do that, sir.

"Q. You would rather not?—A. Yes."

371 And before the Court makes inquiry of Mr. Bary in that connection I would like to call the Court's attention to his testimony on page 66 in this connection, the question being the following:

"Q. The number on your card is No. 91,643. Does that

mean that there were 91,642 members ahead of you?—A. I couldn't answer that. Those cards are issued nationally and they are sent to every state organization and we then distribute them accordingly.

"Q. Who signed this card?—A. I did.

"Q. Do you sign them all?—A. I sign all the cards in this state; not nationally."

The significance of that being that he knows the number of members of his group here, and has openly defied the grand jury and said that he would not answer the question.

The Court: What do you say to that, Mr. Bary?

Mr. Bary: I want to state that I don't know the number of members.

The Court: Can't you give an estimate?

Mr. Bary: And the reason I have refused to give an estimate is based on the fact, as I have indicated in the record, that I did not wish to perjure myself.

372 The Court: If you gave an estimate you wouldn't perjure yourself. You give me your best estimate. Is it a hundred thousand, nine hundred thousand, or twenty-five or what?

Mr. Nevans: This is limited, of course, to the Communist Party of Colorado.

The Court: In Colorado, yes.

Mr. Bary: You see—well, it's very difficult to give an estimate.

The Court: I can't believe that you're head of this organization and yet you haven't any idea how many members you have. The Court instructs you to answer the question.

Mr. Bary: May I understand that if I give an estimate and this estimate is found to be larger or smaller than the actual, I am not subject to perjury?

The Court: You are not, no.

Mr. Bary: I would estimate about a thousand members.

The Court: A thousand members?

Mr. Bary: Yes.

Mr. Nevins: In the State of Colorado?

Mr. Bary: Yes, sir.

The Court: Does that answer your question?

Mr. Nevans: Yes, sir, finally. Now I believe there is one other matter that we wish to have cleared up, if the Court please, beginning on page 73 in connection with the collection of dues within the organization.

"Q. For the number of members in each particular club—I want to get an idea of that.—A. Well, I said they vary from five upwards.

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"Q. Yes, but somebody keeps track of that five upwards?—A. That's right.

"Q. Who keeps track of that five up?"

This is on page 73.

"A. Oh, certain individuals are selected in the club to do that little chore.

"Q. I see. They each have a chairman, a secretary, and treasurer?—A. It depends. Some do and some don't. Some of them may only have a chairman.

"Q. Does the chairman keep up with that?—A. In some instances he might. If there were nobody else around to do that chore he'd do it.

"Q. And if he doesn't do it who does?—A. Then somebody else might be assigned to that.

"Q. The secretary?—A. Either the secretary or the treasurer.

"Q. Now, do you know who does that in each organization?—A. No.

"Q. Who keeps up with that?—A. Who keeps up with what?

"Q. Who keeps up with that?—A. Oh, I know some of the people and Pat knows some of the people.

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"Q. Who are the people you know that keep up with it?—A. I'd rather not mention any names, sir.

"Q. Do you refuse?—A. I refuse."

The Court: Do you still refuse to answer that question, Mr. Bary?

Mr. Bary: I refuse to answer on the ground it might tend to incriminate me.

The Court: What?

Mr. Bary: That it might tend to incriminate me.

The Court: The Court directs you to answer.

Mr. Menin: May I consult with the witness just a minute, your Honor?

The Court: What?

Mr. Menin: May I consult with the witness a minute?

The Court: All right.

Mr. Nevans: Who are the people you know that keep up with it—that is the payment of dues by the various organizations within the state organization. "A. I would rather not mention any names, sir. "Q. Do you refuse? "A. I refuse."

The Court: Do you care to answer, Mr. Bary?

Mr. Bary: I would like to answer the question in this way. To the best of my knowledge, the people that I know are Pat Bell and Paul Kleinbord.

375 The Court: Pat who?

Mr. Bary: Pat Bell and Paul Kleinbord.

The Court: Do you know any others?

Mr. Bary: I can't recall any others.

The Court: Can you think of anyone who might possibly be doing that work?

Mr. Bary: I can't think of anyone at the present time.

The Court: Remember, you're under oath.

Mr. Bary: Yes, sir.

The Court: You might be liable for perjury in addition to being in contempt of Court.

Mr. Bary: I can't think of anyone at the present time, sir.

Mr. Nevans: I would like to point out this to the Court, the answer on the twenty-first: "Oh, I know some of the people and Pat knows some of the people." Now he comes before the Court this morning and gives one person as being the "people" he referred to in many organizations within the state organization.

The Court: Who did you have in mind when you said that you knew some of the people?

Mr. Bary: Well, I had in mind Paul and I had in mind Pat. Those are the people.

376 Mr. Bary: That's all, the two people I had in mind.

Mr. Nevans: It could not be Pat because of the answer he gave. He said: "I know some of the people and Pat knows some of the people."

Mr. Bary: That's my answer, sir.

The Court: Who does Pat know?

Mr. Bary: I can't say who she knows, sir, but I imagine that because of her work she might know some other people that I'm not aware of.

The Court: Do you know where Pat is?

Mr. Bary: I'm not—I don't know where she is, sir. I answered that question before.

The Court: I think he's answered it the best he can. I don't see that there is any proof that he does know anyone else.

Mr. Nevans: If the Court will excuse us just a moment, please, there is one other matter.

Mr. Bary: Your Honor, sir, thinking it over I would like to add another name to that which I recollect—Mrs. Rogers having collected dues also.

The Court: Mrs. Rogers?

Mr. Bary: Yes, sir.

The Court: Who was here yesterday?

Mr. Bary: Yes, sir.

The Court: You're sure you can think of nobody else?

377 Mr. Bary: That's all I can think of at the present time.

The Court: All right. This matter will go over until two o'clock. Be back here at two o'clock.

Mr. Goldschein: May I say something first? I've made a reservation on a two o'clock plane. I don't intend to hold up this proceeding—we don't want to ask the Court to—and Mr. Nevans and Mr. Lilly are taking over. I just got going too strong and I've just exhausted myself; but if the Court will instruct this witness Bary that he must appear before the grand jury when the grand jury reconvenes, and tell us how many members he has in each one of his local clubs, who is at the head of that club, and who collects dues for the membership of that club, we would appreciate it very much.

The Court: You tell Mr. Lilly that so he can call it to the Court's attention.

(Whereupon, a recess was taken until two o'clock p.m.)

Afternoon Session—2:00 p.m.

378 The Court: Proceed.

Mr. Nevans: Your Honor please, I would like to state to the Court that it was necessary for Mr. Goldschein to return to Washington by the two o'clock plane, and he has asked Mr. Lilly and myself to carry on in his absence.

At the time the Court recessed this morning the United States Attorney, in representing the grand jury, had pointed out to the Court various questions and answers given by Mr. Bary to those questions which we wanted to bring to the Court's attention. We felt that Mr. Bary was holding himself in defiance of the grand jury and had proved himself to be contumacious. We have no other material to call to the Court's attention in connection with Mr. Bary.

However, in view of the inquiry of the Court, we would like to make a request of the Court on behalf of the grand jury that Mr. Bary be notified by the Court that he is to appear before the grand jury next Wednesday morning, September 29, at nine thirty a.m. and that he be directed by the Court to answer these questions which the grand jury will propound to him at that time.

The Court: What are the questions?

Mr. Nevans: All of these questions relate to the Communist Party of Colorado. The first question: How many clubs, cells, or subdivisions of the Communist Party of Colorado are there functioning at the present time in the State?

379 Second: Who are the officers of each particular club, cell, or subdivision of the Communist Party of Colorado? State their names and addresses.

Third: State the names and addresses of all members of each particular club, cell or subdivision of the Communist Party of Colorado.

Fourth: Produce the book or books in which the dues paid by each member of each club, cell, branch or subdivision of the state organization are recorded, or if you do not have custody or possession of such books, state to the grand jury who does have possession and custody of such books.

Mr. Bary being the chairman of the board and the president of the Communist Party of Colorado, an organization which is functioning under his direction, should, in the belief of the grand jury, be able to answer all of these questions.

We would like to have the Court so instruct him at this time.

The Court: What grounds have you to believe that he can answer those? I can't instruct him to answer. He is on notice, however, that those questions will be asked him and that he should be prepared to give his answers if he cares to. Of course, if he refuses he will have to come in here and have another hearing. As far as it goes now, I

think Mr. Bary, while he was in contempt of the grand jury, has cleared up, has purged himself of this contempt, and on those matters he is discharged. But that doesn't mean, Mr. Bary, that you musn't answer any fur-
380 ther questions that the grand jury asks you and which are proper questions. Now, you've played ball here this morning and helped us out very much, and if you'll only take the same attitude when you're called before the grand jury and try to be helpful rather than an obstructionist, we'll get along much better. If you don't do that, of course you'll be subject to the pains and penalties that the law provides in such cases for contumacious witnesses.

Now what matter do you want to take up next?

Mr. Nevans: May I suggest that the Court instruct him to be here?

The Court: He will be in the grand jury room next Wednesday morning at nine thirty. Will you be there then?

Mr. Bary: Yes, sir.

The Court: All right, now see if you can't play ball and get along here and not have any more trouble. The Court has to exercise its power and will do so without hesitation, but I don't like to send you people to pail. It's hard on me. But we have to do it in order to perform our duty here. So please play ball with the District Attorney and you'll get along better. The mere fact that you may not like the District Attorney to examine you doesn't make any difference. He is an officer of the Government and he is required to perform his duties. What's the next matter?

381 Mr. Nevans: The Court has under consideration the conduct of Paul Meir Kleinbord.

The Court: Is he here?

Mr. Kleinbord: Yes, sir.

Mr. Nevans: Mr. Goldschein read at length the full transcript of the testimony of Mr. Kleinbord this morning. Now, I wish to call to the Court's attention in particular

the misapprehension under which Mr. Kleinbord is laboring —namely, that he can, when asked a question by the grand jury which he feels might incriminate another person related to him in no way or between whom no form of privilege exists—he feels that he can refuse to answer such questions on the ground that they would tend to incriminate a friend of his; that it would incriminate, as he states it, his political philosophy, his principles. Now, if the Court finds that Mr. Kleinbord is not in contempt up to this time, on behalf of the grand jury we request that he be instructed in regard to that matter that he must answer any questions directed to him concerning other individuals.

I can refresh the Court's recollection, perhaps. The transcript this morning was very lengthy. I have a short excerpt here, if the Court cares to hear it in that regard.

The Court: What page is it on?

Mr. Nevans: Page 80.

The Court: All right, what is it?

382 Mr. Nevans: "Q. Now, what do you do when that form is filled out?—A. The form remains here.

"Q. Where?—A. In our folders, among our records.

"Q. Among your records?—A. That's right.

"Q. Who keeps that?—A. Well, you usually find them in the office in the file.

"Q. That is part of your job, attending to those cards, isn't it?—A. Well, it used to be, yes.

"Q. Until three weeks ago?—A. That's right.

"Q. Now, who else handled those cards other than you? —A. Of course—are you asking me for individuals, sir?

"Q. Yes.—A. Well, in that case, sir, I feel that I cannot make statements in this respect because I feel it is incriminatory.

"Q. What is incriminatory?—A. To make statements in regard to other individuals. I feel that I want to answer questions here honestly about myself, as I have, questions pertaining directly to myself, but I feel that other questions pertaining to other individuals are incriminatory."

383 The Court: Mr. Kleinbord, you are directed to answer those questions. You are instructed that this

freedom from self-incrimination applies only to you and not to other people. If you know anything about anybody else and are asked proper questions, you must answer.

Mr. Kleinbord: Yes, sir.

The Court: All right, that settles that. Will you do that?

Mr. Kleinbord: Yes, sir. I would like to make a short statement.

The Court: All right.

Mr. Kleinbord: I would like to state that I had to come here under protest.

The Court: That what?

Mr. Kleinbord: I had to come here under protest. I'm here under protest, because I was home in bed, under doctor's orders, and Attorney Goldschein ordered me out of bed.

The Court: You can go now and be at the grand jury next Wednesday morning at nine thirty o'clock.

Mr. Nevans: I would like the record to show, if I may, in connection with this matter that has just been raised, that Mr. Goldschein called the doctor—

The Court: I don't care about that. It isn't necessary to go into that.

Mr. Nevans: One other matter, if the Court pelase. If the Court would instruct this man along the same
384 lines as the Court instructed Mr. Bary, in view of his position. He is secretary of the Denver section of the Communist Party of Colorado, and the same questions propounded to Mr. Bary by the grand jury through the United States Attorney's office at this time, we would like to propound to Mr. Kleinbord, in view of his official position as secretary of the Communist Party of Denver.

The Court: What is the question in point?

Mr. Nevans: Exactly the same as those asked Mr. Bary, except limited to the Communist Party of Denver.

The Court: I can't instruct him to answer that. He is instructed to answer any proper questions on next Wednesday morning. If he doesn't, you can't bring him in here and we'll pass upon it then.

Mr. Nevans: And you find that Mr. Kleinbord is not in contempt?

The Court: No. He has cleared himself. That is, he says he will go back and answer these questions, so we don't pass upon the contempt yet. It is still pending against him, depending upon his conduct from here out. Now what's next?

Mr. Lilly: We have another matter, a matter of contempt involving one Tracy Roy Rogers. He was also called as a witness by the grand jury. I don't know whether Your Honor has this transcript or not. With your Honor's permission I would like to call your Honor's attention to various parts of the transcript of the grand jury proceedings. He was first asked whether or not he held any official position in the Communist Party.

385 The Court: What page?

Mr. Lilly: Page 128, Your Honor.

The Court: All right, go ahead.

Mr. Lilly: The question by Mr. Goldschein was: "Mr. Rogers, did you ever hold any official position in the Communist Party of Denver, Colorado?—A. Sir, I would decline to answer that question on the basis that it might incriminate me. However, I would like to add that my political activities are a matter of public record.

"Q. Which means what? What is the public record, Mr. Tracy?—A. The people know whether or not I held a position in the Communist Party."

Then he wouldn't go on and state definitely whether he did or did not hold a position.

The Court: Mr. Rogers, you are instructed to answer that question before the grand jury next Wednesday morning at nine thirty. Will you do that?

Mr. Rogers: May I consult my counsel, your Honor?

The Court: All right, but you be there next Wednesday morning at nine thirty. That is a perfectly proper question. There is no crime, as I have stated here before, in admitting or saying you are a member of the Communist Party. There is no law against being a Communist, so it wouldn't incriminate you in any way. What's next?

386 Mr. Lilly: On page 133, Your Honor please, he was asked the question with reference to the collection of dues, and the question was: "All right, now who kept the records with reference to dues at that time?—A. I believe I would decline to answer that question because I believe I would incriminate myself."

He refused to answer.

The Court: You are instructed, Mr. Rogers, to answer that question at the same time and place. What's next?

Mr. Lilly: The next one is: "A. If I told you who kept the records.

"Q. It would incriminate you for what, Mr. Rogers?—A. I believe it would.

"Q. For what?—A. That, sir, is my belief."

That all goes to the same question.

The Court: You can't decide yourself what questions are proper and not proper. That's for the Court to decide; and you are instructed to answer that question.

Mr. Lilly: Now, if Your Honor please, beginning on page 134 he was interrogated with reference to the persons who held keys to the offices of the Communist Party of Denver, and the question was: "Well, who has a key? That's what I'm asking you.—A. Well, if I said that I know who has a key, then there may be someone else
387 who has a key.

"Q. No, you don't have to tell me everybody; just tell me who you know has a key.—A. I decline to answer that question."

He flatly refused to answer that one.

The Court: Where is it?

Mr. Lilly: Pages 134 and 135.

The Court: That is a proper question. The witness will answer that question. What's next?

Mr. Lilly: Then if Your Honor will turn to page 142, he was being interrogated with reference to Patricia Blau, the secretary of the Communist Party. The questions went along this line:

"Q. She was secretary of the Communist Party, wasn't she?—A. I will decline to answer that, sir, on the grounds that it might incriminate me."

The Court: Wait a minute. Where?

Mr. Lilly: Beginning on page 142, top of the page.

The Court: "She was secretary of the Communist Party, wasn't she?"

Mr. Lilly: That's right.

The Court: Who was he talking about?

Mr. Lilly: Talking about Patricia Blau. The preceding page goes to that, and he refused to testify as to
388 whether or not she was the secretary of the Communist Party, and that whole line of testimony is right along the same line.

"Q. Will you please tell us whether or not she held any office in the Communist Party?—A. I decline to answer that on the ground it would incriminate me.

"Q. Don't you know that she has the books and records of the Communist Party as of January this year?—A. No, I didn't.

"Q. You don't know that?—A. Well, to the best of my knowledge I do not.

"Q. Do you know who has the books and records as of January this year?—A. I don't. I never have been concerned with that and it could have been any one of a number of people. I don't know.

"Q. Any number of what people?—A. You mentioned several. It might have been Arthur Bary, it might have been—I don't know.

"Q. It might have been who?—A. Do you want a list?

"Q. Yes, sir. Who would have the books?—A. Well, I

decline to answer on the grounds that it might tend to incriminate me, sir.

"Q. Did Mr. Kleinbord have the books?—A. I don't know sir.

389 "Q. Well now, you said it could have been two or three. Will you tell us who those two or three are? —A. I will not."

The Court: Those are perfectly proper questions, and Mr. Rogers, you are instructed to answer those. Will you do so or not?

Mr. Rogers: I will.

The Court: What is your answer?

Mr. Rogers: I will answer those questions.

Mr. Lilly: That about covers it, Your Honor please. Now I desire that Your Honor instruct him to be at the grand jury at nine thirty next Wednesday morning.

The Court: Will you be there at nine thirty next Wednesday morning?

Mr. Rogers: Pardon, sir?

The Court: Be before the grand jury at nine thirty next Wednesday.

Mr. Rogers: Yes, your Honor.

The Court: All right, thank you very much.

Mr. Menin: If the Court please, may I request the Court to admit to bail the other persons who were sentenced yesterday? In view of what has happened thus far there may be an entirely different situation next Wednesday morning, and if the Court will indulge us in that respect it would be highly appreciated in view of the fact that one of the witnesses is a very sick woman and we're just very

390 much afraid that she may have a serious collapse. She is the mother of a small child; she has three small children. She hasn't seen those children since her incarceration, which was considerably before the entry of the judgment of this Court. She was kept in custody for

two days, coming back and forth to Court, before Your Honor imposed sentence.

In view of this I would like to ask the Court to permit these people to be on bail, at least until such time—or if the Court would continue the matter until next Wednesday morning, there may be an entirely different situation.

The Court: I can't do that. I gave them time, hoping they would change their minds, and that's the reason they were brought back and forth here, instead of deciding the matter the first day, which I could have done. As it was, there was no change in the picture and I had given them a couple of days, hoping they would change their minds. I turned them loose for a couple of days for that purpose.

Mr. Menin: They were never turned loose, Your Honor.

The Court: I won't discuss it with you; but they had an opportunity to recant and answer the questions. Until they do that I can't grant any bail. Your application is denied.

Mr. Menin: Exception.

Mr. Nevans: If the Court please, a bench warrant issued for Mr. Kleinbord by direction of the Court yesterday. The Marshal would appreciate having an official release of that.

391 The Court: He said he would be here. What was it, a subpoena issued or warrant?

Mr. Nevans: No, sir, a bench warrant.

The Court: The warrant will be held for naught and quashed. You can turn him loose, Mr. Marshal, with the understanding he will be here next Wednesday morning. If he doesn't show up that will be another contempt.

Is that all in these matters?

Mr. Nevans: That's all, Your Honor.

The Court: All right.

[Proceedings, September 29, 1948.]

Denver, Colorado, September 29, 1948, 9:30 o'clock a. m.

6 Present: Mr. Max M. Bulkeley, U. S. District Attorney; Mr. E. E. Nevans, Assistant U. S. District Attorney.

ARTHUR BARY, called as a witness herein, having been previously sworn, resumed the stand, was examined and testified as follows:

Examination by Mr. Nevans.

Q. You are Mr. Arthur Bary?—A. Yes.

Q. You have been sworn before this body before, have you not?—A. I have.

7 Q. You are being recalled as a witness before the Grand Jury this morning and you are under oath. Mr. Bary, when before this body last week you stated that you were chairman of the Board of the Communist Party of Colorado; is that correct?—A. I stated I was chairman of the Communist Party.

Q. Chairman?—A. Of the Communist Party of Colorado.

Q. Is that the title by which you are known within the organization?—A. Yes.

Q. Do you have any other title within the organization, or do you hold any other position within the organization?—A. That's all. Well, I'm also an organizer. I'm known as an organizer, too.

Q. Now, Mr. Bary, how long have you been chairman of the Communist Party of Colorado?—A. I think for the past two to three years; I don't recall exactly.

Q. Did you hold any position with the Communist Party of Colorado prior to that time?—A. No, I don't understand that question. What do you mean?

8 Mr. Nevans: Read the question back to Mr. Bary. I think it's clear enough.

(Question read.)

A. I don't think so.

Q. Were you a member of the Communist Party of Colorado prior to that time?—A. I will—I decline to answer that on the grounds that it might tend to incriminate me.

Q. For the violation of a Federal offense?—A. Yes.

Q. You were before Judge Symes last Friday, Mr. Bary, you recall?—A. I was.

Q. He advised you of your rights. Do you wish to have Judge Symes pass upon this question?—A. I don't think that I am in the position to determine that.

Q. You wish Judge Symes to determine that question, whether you should answer that question or not?—A. It isn't a matter of my wishing. I believe he has a right to do that.

Q. But you wish to refuse to answer that question?—A. I decline to answer that question on the ground that it might incriminate me, and I'd like to explain it, if I may.

Q. Certainly.—A. First of all, I feel that this is an invasion of my constitutional rights.

9 Q. Now, Mr. Bary——A. There is a discussion going on here—

Q. Excuse me just a minute, Mr. Bary. We do not want a speech. If you want to explain——A. Well, I'd like to make my statement, if I may.

Q. If you wish to make a brief statement——A. I'd like to make a brief statement as to why I do not wish to answer that question.

Q. All right proceed.—A. I consider it is an invasion of my constitutional rights to inquire into my political thinking, and while I do not believe with the statements of the Attorney General that our organization is subversive, and while from my knowledge it is not subversive but rather it is acting in the interests of the American people, nevertheless there has been a political climate develop in this country and with all kinds of investigations, and so on down the line, and for that reason I wish to invoke my privilege and not answer this question on the grounds that it might tend to incriminate me.

Q. Is that all, Mr. Bary?—A. That's all, Mr. Nevans.

Q. All right; you know, of course, that Judge Symes has ruled that the question, "Are you a member of the Communist Party?" must be answered before this body. You

are familiar with that fact?—A. I am aware that he made that kind of a ruling.

10 Q. And in the face of that ruling you wish to refuse to answer this question on the ground that it might incriminate you?—A. I wish to invoke my privilege and decline to answer that question on the grounds that it might tend to incriminate me.

Q. All right, fine. Now, Mr. Bary, how long have you lived in Colorado?—A. I'd say two to three years, more or less; I don't know exactly.

Q. Who was your predecessor as chairman of the Communist Party of Colorado?—A. I decline to answer that question on the ground that it might incriminate me.

Q. Incriminate you for the violation of a Federal offense?—A. Yes.

Q. Mr. Bary, do you devote your full time to the activities of the Communist Party of Colorado?—A. I do.

Q. Are you paid a salary by that organization?—A. I am.

Q. What is that salary?—A. $35.00 a week.

Q. Now, in your position as chairman of the Communist Party of Colorado what are your duties?—A. Well,

11 my duties are to help to carry on the presentation of the position of the Communist Party before the people of Colorado, present our ideas, our thoughts, and fight for the various things that we think are of benefit to the people.

Q. And your position is an executive or an administrative position, is it not?—A. I suppose it is.

Q. What other officers of the Communist Party of Colorado are there at the present time?—A. What other officers?

Q. That's correct?—A. You mean the names of the individuals?

Q. The names of the individuals and titles that they hold in the Communist Party of Colorado.—A. I decline to answer that on the ground that it might tend to incriminate me.

Q. Incriminate you for the violation of a Federal offense?—A. Yes. I don't believe that it is possible to incriminate me for the violation of any other offense.

Q. Mr. Bary, I just wish our understanding to be made clear of your answer to that question. I have asked you who the other officers of the Communist Party are, and to state their names and the titles that they hold within the Communist Party of Colorado. You understand the question, do you not?—A. I understand the question.

12 Q. Is your answer the same?—A. My answer is the same.

Q. You wish to defy this Grand Jury in that regard?—A. I don't wish to defy anybody. I'm merely invoking my privilege.

Q. You were present in court last Friday, were you not, when Judge Symes instructed Mr. Kleinbord that his statement that he did not wish to incriminate others was without merit and that he, himself, must answer any such questions concerning other people than himself?—A. I wasn't in court, but I heard about that. I left right after I was dismissed, sir.

Q. But you still wish to refuse to answer that question?—A. I refuse to answer that question on the ground that it migth tend to incriminate me.

Q. All right. Now, Mr. Bary, how many clubs, cells, or subdivisions of the Communist Party of Colorado are there in existence at the present time?—A. I decline to answer that question on the grounds that it might tend to incriminate me.

Q. May I call your attention, Mr. Bary, that these questions were read in court in your presence last Friday and that Judge Symes instructed you to come before this Grand Jury and answer these questions if you could, ruling, in effect, that the questions are proper questions

13 and that you should answer them if you could. Do you recall Judge Symes' statement in that regard?—A. My recollection of Judge Symes was that I was to appear before this Grand Jury this morning, these questions were to be put to me, and I was to answer them to the best of my ability, and under whatever circumstances would prevail today. That's my understanding.

Q. That is merely rephrasing what I said, is it not?—A. All right. It isn't the way the newspapers had it, though.

Q. This Grand Jury is not concerned with the newspa-

pers, Mr. Bary. This Grand Jury is investigating certain matters, and your testimony is considered necessary to the continuance of those investigations.—A. And I—

Q. Just a minute, Mr. Bary, please.

Mr. Nevans: Will you read the last question to Mr. Bary again?

(Whereupon the question was read as follows: How many clubs, cells, or subdivisions of the Communist Party of Colorado are there in existence at the present time?)

A. I decline to answer that question on the ground it might tend to incriminate me.

Q. Very well. The second question: Who are the officers of each particular club, cell, or subdivision of the Communist Party of Colorado at the present time?—A. Same answer.

Q. You refuse to answer?—A. Yes, sir.

Q. State the names and addresses of each of the officers of each particular club, cell, or subdivision of the Communist Party of Colorado.—A. I decline to answer on the ground it might tend to incriminate me.

Q. Very well. The third question: State the names, and addresses of all members of each particular club, cell, or subdivision of the Communist Party in Colorado?—A. I decline to answer that question on the grounds it might tend to incriminate me.

Q. Very well. Question No. 4: Do you have possession or custody of any official books or records of the Communist Party of Colorado in which the dues paid by each member of each club, cell, or subdivision of the state organization are recorded?—A. No.

Q. Do you know who has possession or custody of the book or books or records in which the dues paid by each member of each cell, club or subdivision of the State organizations are recorded?—A. To the best of my knowledge, I am not aware who has any such books.

Q. Have you had any conversation since receiving the subpoena issued by this Grand Jury with any member or non-member of your organization with reference to the book or books or records in which the dues paid by members of your organization, including the

cells, subdivisions, are recorded?—A. I have stated here that there are no such books, therefore, I couldn't have such discussions.

Q. This Grand Jury has reason to believe otherwise. Do you know Mr. Paul Kleinbord?—A. I do.

Q. How long have you known Mr. Paul Kleinbord?—A. A couple of years, maybe more.

Q. What position in the Communist Party does he hold at the present time?—A. He is a section organizer.

Q. For what part of your organization?—A. Denver.

Q. And what is the Denver subdivision of your organization called officially within the Communist Party of Colorado?—A. The Denver Section.

Q. The Denver Section? Who appointed Mr. Paul Kleinbord to that position?—A. I decline to answer that on the grounds it might tend to incriminate me.

Q. Did you appoint Mr. Paul Kleinbord to that position?—A. Same answer.

Q. Did a state committee or a state board appoint
16 Mr. Kleinbord to that position?—A. I decline to answer that question for the same reason as the above.

Q. Was Mr. Kleinbord working under your supervision during the time that he has been section organizer for the Communist Party of Colorado?—A. I stated once before, nobody works under me; I'm not an employer.

Q. Yes, sir. However, you stated to this grand jury this morning that the nature of your duties is executive and administrative. Now, this Grand Jury would like to know whether Mr. Paul Kleinbord works under your direction as section organizer for the Communist Party of Denver?—A. Not directly under my direction; I am concerned with what he does, I have some relations with him. I don't determine everything Paul does.

Q. How long has Mr. Kleinbord been section organizer for the Communist Party of Denver?—A. About a month or so.

Q. What was his position prior to that time in the Communist Party of Denver, or the Communist Party of Colorado?—A. He was a membership director.

Q. How long did he serve in that capacity?—A. I
17 don't know exactly.

Q. Approximately, Mr. Bary?—A. Oh, I don't know; six months or a year, or thereabouts.

Q. Six months to one year?—A. To the best of my recollection, thereabouts, to the best of my ability. I don't know exactly. It may be more than that, too, when I think about it.

Q. Did Mr. Kleinbord, as membership director, act under your direction as chairman of the Communist Party of Colorado?—A. I decline to answer that question on the grounds it might tend to incriminate me.

Q. Who appointed Mr. Kleinbord to the position of membership director of the Communist Party of Colorado?—A. Same reason.

Q. You decline to answer?—A. Yes, sir.

Q. Again I call to your attention that you have stated that the nature of your duties is administrative and executive. Do you have the responsibility for appointing any officials of the Communist Party of Colorado, whether their duties be minor or of a policy making nature?—A. I would like to explain to this question of executive. I don't understand the term, and I attempted to answer that in the sense that the primary task that I have was to present before the people of Colorado our position relating to the issues that are facing the people. As to answering the question as to whether
18 I appoint, I decline to answer that on the ground it might tend to incriminate me.

Q. Will you state to this grand jury whether there is such a body as the executive committee of the Communist Party of Colorado?—A. I decline to answer that for the same reason.

Q. Mr. Klienbord, Mr. Bary, for your information, appeared before this body and described a record which this grand jury wishes to have brought before it, an official record of the Communist Party of Colorado, in which membership dues are recorded and in which arrearages of dues of members are recorded. He stated to this body in substance that the responsibility for that particular book was his and yours. He stated that when he was relieved of his duties as membership director and made section organizer that it was not determined to whom that record would be turned over, and at the time he was called last week the book, to the best of his knowledge, was in a metal file in the office of the Communist Party in Denver. Mr. Bary, having called this statement of Mr. Kleinbord to your attention, this grand jury

wishes to know whether you again wish to state that to the best of your knowledge such a book was never in existence.—A. I have answered in this grand jury that I have no knowledge of a book which contains the list of members of our organization.

Q. That isn't the question.—A. Well, then, please define what you wish to ask of me, sir.

19 Mr. Nevans? Will you read the last question?

(Question read.)

Q. Your answer, Mr. Bary?—A. We have—that is a very difficult question to answer, Mr. Nevans. We have dues books, and I have seen such books where receipts are made out. As to the specific book, I have not seen it.

Q. Just to refresh your recollection, possibly, I'm going to read from Mr. Kleinbord's testimony his description of that book which was quite definite, even going so far as to state the approximate dimensions of the book, Mr. Bary. The nature of the inquiry to Mr. Kleinbord was the manner in which *does* are recorded by your organization.

"Q. What kind of book do you keep of membership dues?—A. Well, it may seem slightly difficult to understand, but I can explain that. Even though I kept records of dues forms, there were no names because the way we work it out is that in some cases there are simply letters, you know, the letters of the first name of an individual.

"Q. Yes.—A. And so forth. That's a simple kind of identification.

"Q. Or a card number?—A. No, sir.

"Q. Well, how do you keep a record of that?—A.
20 Well, there are dues stamps. You know how they keep it in a union.

"Q. No. You don't have any information in your book how many dues stamps each member has?—A. Sure.

"Q. How do you keep track of it?—A. Because we have—just as there is in a union, there are stamps issued, ten cent stamps a month for unemployed.

"Q. And thirty-five cents?—A. Thirty-five cents. That's in the wage scale and according to the amount of money that people earn, that's how much they pay, and it's a very minimum amount per month. And so every time they pay dues

they get a stamp similar as to a union. Each person—if anyone here has been in a union they know that's the way it's done.

"Q. All right, now if a man doesn't show up at the meetings and leaves his card at home and somebody tells you that he is three months behind, can you look at your record and show he is three months behind?—A. Well, I wish our records were that good, you know, but we don't—

"Q. Generally, can you do that?—A. In some cases, perhaps, yes.

"Q. Well, just tell us how you do it. That's exactly what I'm asking you.—A. Well, in some cases if I could
21 identify by the initials some person that way I'd know that that person is in arrears, yes.

"Q. How? What record do you keep with an initial on it?—A. The record.

"Q. Do you keep a book?—A. Certainly.

"Q. What does the book look like?—A. It's a simple record book, just made up in the national office of the Communist Party. It is a very simplified bookkeeping system that actually covers what has to be covered so that it can be handled by someone like me who knows nothing about bookkeeping.

"Q. Just how is it done? Describe it for us.—A. Describe it?

"Q. We're not bookkeepers.—A. I don't know anything about bookkeeping; neither am I. That's the difficulty.

"Q. Well, you keep them; we don't. What is it like?—A. There are basically two forms; one is a cash receipt form and everything is in duplicate, and the other is a cash paid form. The cash receipt form is what you naturally take in and that's itemized and totalled on the bottom.

"Q. Totalled on the bottom? How big a book is that? Is it as big as this, six by ten?—A. Well, I'd say it's a little shorter and a little wider.

22 "Q. A little shorter? You'd say about eight by eight?—A. Well, all right, eight by ten, something like that.

"Q. Ten inches wide and eight inches long?—A. That's right.

"Q. And the first page is ruled, the pages are ruled?—A. The pages are ruled.

"Q. Now, does it have an alphabetic index on it? Is is alphabetical like this?—A. Oh, no, nothing like that.

"Q. It isn't alphabetical at all?—A. No, it's a record book where you simply have duplicate sheets for cash in-take and cash out-put.

"Q. All right; if Joe Doakes pays you $3.00 for advance dues, how do you list Joe Doakes in this book?—A. Well, the records I've taken in don't list Joe Doakes; it only lists organizations—that is, it only lists the branches.

"Q. Yes.—A. The branches.

"Q. All right.—A. That's the only time—

"Q. I'm not interested in that. Let's get back to the individual member. How do you keep track? What does your book show with reference to Joe Doakes having paid you $3.00 for dues in advance?—A. How do you mean, how does the book show that?

23 "Q. How does your book appear? What entry do you make on the books to show that Joe Doakes paid you $3.00?—A. I make no such entry, sir.

"Q. Who does make an entry?—A. Anyone who made that, who takes the dues from him makes that kind of an entry.

"Q. Now, wait a minute. Anybody would be who? Does everybody collect dues?"

Then, Mr. Bary, Mr. Kleinbord went to the offices of the Communist Party; he was recessed by this grand jury and returned and said that the book had disappeared since he last saw it there.

Now, I ask you again, do you have knowledge, since you have been chairman of the Communist Party of Colorado, of any official record kept by the Communist Party of Colorado in which the dues paid by the individual members of that organization were recorded, whether by the initial of the member or by name or by number or by any other reference?—A. I would like to explain that.

Q. Answer that question first, Mr. Bary.—A. I'd like to answer it. I'm not here being pilloried, I hope.

Q. You certainly are not.—A. And I'd like to explain the limitations of my ability to answer such a question.

Q. Merely answer yes or no and then you can give

24 us a full explanation, but you can answer that question directly.—A. What is the question? Do I know that there are books in the Communist Party?

Q. Just a minute.—A. Is that what you want to know?

Q. Just a minute. Will you read the question?

(Whereupon the question was read as follows: "Now, I ask you again, do you have knowledge since you have been chairman of the Communist Party in Colorado, of any official record kept by the Communist Party in Colorado, in which the dues paid by the individual members of that organization were recorded, whether by the initial of the member or by name or by number or by any other reference?")

A. I have knowledge that there are books, dues books, in the Communist Party which are used for the purpose of collecting dues.

Q. Very well. Thank you.—A. Now, may I make my statement, sir?

Q. Yes, you may.—A. My task is not one that is concerned with these problems; my work is more in the field of going out into the field and talking to people, having radio broadcasts, and so forth, and therefore, I am not in a position to go into the details of how these matters are arranged.

Q. Do you wish to change the statement you made to
25 this grand jury earlier this morning, that the nature of your duties is executive and administrative? Do you wish to make a change in that statement at this time?—A. I wish to state the character of my work, the type of my work, which is primarily one of presenting the public position of the Communist Party—now, I'm not a trickster and I don't know what's going on here.

Q. We're happy to state that we would be most receptive to your cooperation.—A. Well, I certainly try to cooperate, Mr. Nevans.

Q. Just a minute now, just a minute. All this grand jury wants is certain official records of the Communist Party, and we can't seem to get those records.—A. And I have stated to this grand jury that to the best of my knowledge I have no knowledge of these records at the present time. I brought in voluntarily, without a subpoena and without anything being done—I went to the office and got certain books there that were available and brought them here.

Q. Very well, Mr. Bary.—A. I can't do any more than that.

Q. Yes, most certainly you can. The grand jury would like to know from you the names of the officers of the state organization, of the Communist Party in Colorado. This body would like to know from you the names of the officers of each of the branches, subdivisions, or cells of the Communist Party of Colorado. You have refused to answer
26 those questions. Do you again so refuse?—A. I have stated the reason that I have refused is on the grounhs that it might tend to incriminate me, and I have tried to explain to you and to the grand jury why this is so.

Q. Mr Bary, now will you please explain to the grand jury the structural organization of the Communist Party of Colorado?—A. It is organized on a local basis, with branches and clubs who carry on their particular activities, and all of these branches are—that is the basic form of organization. Now, what else do you wish to know?

Q. How many branches are there in Colorado?—A. I have stated the reasons why I decline to answer that, on the grounds that it might tend to incriminate me.

Q. Will you give us the names of the Denver cells or branches of the Communist Party?—A. I have answered that question before, and the same answer prevails now.

Q. You refuse?—A. It is not—

Q. Do your duties extend beyond the State of Colorado, Mr. Bary, in the Communist Party?—A. I am responsible for the states of Wyoming and New Mexico also.

Q. You are also district organizer for those states?—A. Yes.

Q. Those three states are known as what subdivi-
27 sion of the national Communist Party, Mr. Bary?—A. I think it is District 19.

Q. You are pretty certain it is District 19, aren't you?—A. To the best of my knowledge, it is, yes, sir.

Q. To your knowledge?—A. I don't want to say I'm certain.

Q. You are district organizer of District 19, are you not?—A. Yes, I am. Let me explain why I am unclear on the number: Because the number isn't too often used.

Q. What is the official designation? How is it known

within the national organization?—A. Well, I believe it is known as the District 19.

Q. You state it is not too often referred to that way?—A. That's right. I mean, as far as I'm concerned here, I think of it in terms of the States of Wyoming, Colorado and New Mexico, and we don't have too many references to that particular number, to the number that is used, too often.

Q. As part of your duties, are you charged with the responsibility for sending a certain amount of the dues collected from local members of the Communist Party of Colorado to the national organization?—A. Well, I suppose that the national office expects me to see that money is sent in, but I do not do that particular piece of work.

Q. Who does that?—A. I decline to answer that
28 question on the ground that it might tend to incriminate me.

Q. Will you state to this grand jury who the individuals are that collect dues within the Communist Party of Colorado?—A. Collect dues from who?

Q. From the members.—A. Do you mean in each particular branch?

Q. Any people whom you know that are charged with the collection of dues within any subdivision of the Communist Party of Colorado and any people who actually make the collection of dues.—A. Well, I answered this question in court. I named two persons who I believed were handling dues, and that was Paul Kleinbord and Pat Bell.

Q. They are handling dues?—A. Well, I say that those are the two persons that I answered in relation to the question that I was asked to answer in court.

Q. Do you know of any others?—A. At the present time I can't recall anybody.

Q. Now, your answer is that those two persons handle dues; is that correct?—A. Those two persons are the persons where dues came into.

Q. They accept dues from the individual members of your organization?—A. I don't know where they accept the dues from; I know that they are the ones that take care of
29 the dues.

Q. Do you know, can you name for us, any members of the Communist Party of Colorado who actually collect the

dues from the members of the Communist Party of Colorado?—A. I decline to answer that for the same reason as above.

Q. That it would tend to incriminate you?—A. That it would tend to incriminate me.

Q. For the violation of a Federal offense?—A. Yes.

Q. This is more wearisome to us, Mr. Bary, than to you.—A. I assure you it isn't as *worrisome* to you, because I've never been subjected to such persecution merely because of my political beliefs.

Q. May I state to you that it is very seldom that a grand jury runs into such obstruction as you are causing this body.—A. Well, I am sure that it is very seldom that a grand jury investigates a person because of his political beliefs.

Q. Now, please. This is enough, Mr. Bary. Now, please.—A. —and for no crime.

Q. Now, just a mintue. Will you state to this grand jury whether or not these are the names by which the branches of the Denver section of the Communist Party of Colorado are known: Westside Branch, Jewish Branch, Packing House Branch, Southside Branch, Mexican Branch, Youth Branch.—A. Are you through?

Q. Yes.—A. I decline to answer that on the ground
30 that it will tend to incriminate me.

Q. Will you state to this grand jury the name of any individual known to you to be a member of any of the branches of the Denver section of the Communist Party who can furnish information to the grand jury as to who is now collecting dues from members of the various branches of the Denver section?—A. I decline to answer that question on the grounds that it will tend to incriminate me.

Q. Do you know a man by the name of James Fowler who resides at 2555 West 37th Avenue in Denver, Colorado, Mr. Bary?—A. I decline to answer that question on the same grounds.

Q. Do you know a Mr. Theodore Wilson who resides at 921 East 19th Avenue in Denver, Colorado, Mr. Bary?—A. I decline to answer that for the same reason.

Q. Do you know a Rae Gwynn who resides at 903—24th Street, Mr. Bary?—A. Same answer.

Q. Do you know a Maia James, 1465 Ivanhoe Street, Denver, Colorado?—A. Same answer.

Q. Do you know a Harold Zeplin who resides at 2403 Champa Street in Denver, Colorado, Mr. Bary?—A. Same answer.

Q. To shorten the inquiry here, Mr. Bary, will you
31 state whether you are prepared to answer to the Grand Jury whether you have attended any meetings of the Communist Party of Colorado in the year 1948?—A. What's that?

Mr. Nevans: Read the question.

(Question read).

A. I decline to answer that on the same grounds, for the same reason.

Q. The same question, only in the year 1947. What is your answer to that?—A. The same.

Mr. Nevans: Does any member of the Grand Jury have any questions to ask Mr. Bary prior to our recessing him for the time being?

If not, Mr. Bary, you can be recessed subject to call. You are not excused, pending call of this Grand Jury. Remain in the corridor, please, Mr. Bary.—A. I always have.

Mr. Nevans: Thank you.

(Whereupon the witness left the Grand Jury room.)

Filed October 6, 1948.

[Proceedings, September 29, 1948.]

Denver, Colorodo, September 29, 1948, 9:30 o'clock a. m.

204 Present: Mr. Max M. Bulkeley, U. S. District Attorney; Mr. E. E. Nevans, Assistant U. S. District Attorney.

PAUL KLEINBORD, called as a witness herein, having been previously duly sworn, resumed the stand, was examined and testified as follows:

Examination by Mr. Nevans.

205 Q. Your name is Paul Kleinbord; is that correct?—A. That's correct.

Q. You have been sworn before this Grand Jury?—A. That's correct.

Q. And you are reappearing at the instruction of the Court last Friday morning; is that correct, Mr. Kleinbord?—A. Right.

Q. I call to your attention, Mr. Kleinbord, that you are still under oath. Now, Mr. Kleinbord, when you testified here last Thursday, I believe it was, you testified to a certain record, official record of the Communist Party in Colorado in which the dues paid by individual members was recorded. You described the approximate dimensions of that book and you stated that the individual member who paid dues was described by his initials, or perhaps by nickname; is that correct?—A. I believe the testimony shows that I said by initials.

Q. By initials?—A. That is the best knowledge I have of it, yes.

Q. When was the last time you saw that record, Mr. Kleinbord?—A. The testimony will show that I gave, a month ago.

Q. About a month ago?—A. Maybe more, yes.

Q. That was at the time that you became section organizer for the Denver section of the Communist Party of

206 Colorado?—A. Around that time, that's right.

Q. Have you discussed that particular record, that particular book, Mr. Kleinbord, with anyone, whether a member of the Communist Party of Colorado or a non-member, since receiving a subpoena to appear before this body?—A. I have not, sir.

Q. Do you have any knowledge who at the present time has custody or possession of that book?—A. No, I do not.

Q. Do you have any knowledge what has become of that book?—A. No, I do not. I would like to clear up something that may cause a misunderstanding here, and that is that the files that I referred to are not in the form of a book, but that the sheets have perforated edges and they are removed, and that's the way they are kept in the folders.

Q. The stub is kept in the folder?—A. No, the sheets themselves.

Q. In file folders?—A. That's right, so they wouldn't be in an actual book form, but in the file, in a folder, when they are removed from the book.

Q. How many such folders were there in the metal files which you described in the office of the Communist Party at the time you were membership director?—A. Well, I couldn't say accurately.

Q. Was there more than one folder containing those
207 sheets?—A. Yes, there was more than one.

Q. Was there more than five?—A. I would say there were a number of them, maybe five.

Q. Approximately?—A. Oh, it would be very approximate.

Q. Would you say ten?—A. Perhaps; maybe five or six or seven, something like that.

Q. Not more than ten?—A. I don't think so. I mean, it had no particular—there was no particular meaning to the number of folders that were there except that they were just put in there when they got a little bit loaded, another folder would be put in.

Q. Each of the folders contained the record that you have just described to the Grand Jury?—A. That's right.

Q. Was there a tab on the folder describing the contents of the folder?—A. I don't think so.

Q. Was there any written description on the folder describing the contents of the folder?—A. I don't believe so.

Q. Those folders were in your custody when you were membership director of the Communist Party of Denver?—A. That's right.

Q. And were kept in the metal file which you de-
208 scribed to the Grand Jury previously, which is located in the Communist Party offices in Denver?—A. That's right.

Q. Now, do we understand you correctly to state that you have had no conversation with anyone concerning those records since a subpoena was issued on you by this body?—A. I said no, and to the best of my knowledge I still say no.

Q. You did not discuss those records with Mr. Arthur Bary?—A. No, sir.

Q. You did not discuss those records with Tracy Rogers?—A. No, sir.

Q. Or with anyone, any other member of the Communist Party?—A. No. I consider that the testimony I gave here is secret, and I'm under oath, and I have tried to stick to that.

Q. Fine. We're happy to hear that, Mr. Kleinbord. Now, will you state to the Grand Jury what your duties are as section organizer of the Denver Section of the Communist Party?—A. I believe I have already answered that question in the previous testimony.

Q. If you will please state again to the Grand Jury what your official duties are in that capacity.—A. As section organizer, my official duties, are as I stated—I have the responsibility to mobilize for mass meetings, such as the one we are going to have on Friday. That's two days from now. That's one of my responsibilities, the major one.

209 Q. Where is that meeting to be *here*?—A. That meeting is to be held in the Continental Oil Building.

Q. Is that an open meeting?—A. It is a mass meeting, and a national committee member, Elizabeth Gurley Flynn, will be there as the guest speaker.

Q. Did you organize the demonstration that was held outside the post office building last Saturday morning?—A. No, sir, that was the Progressive Party demonstration in which I did take part.

Q. Did you call anyone to ask them to participate in that demonstration?—A. No, sir.

Q. Who called you to ask you to participate in that demonstration?—A. Who? I wouldn't even remember. I just heard that such a thing was going to take place.

Q. From whom did you hear it?—A. I don't recall.

Q. You don't recall?—A. No, I don't.

Q. You didn't consider it anything unusual, did you?—A. No. I believe that's along the course of things as they occur.

Q. Under whose direction do you work, Mr. Klein-
210 bord, as section organizer?—A. Under Mr. Bary's direction.

Q. Directly under Mr. Bary's direction?—A. I'd say so.

Q. Under anybody else's direction?—A. Well, under the direction of the national organization.

Q. And any directives you receive from them, do you receive them direct or do you receive them through Mr. Bary?—A. No, we get mail in the office.

Q. Addressed to you?—A. Not yet.

Q. Not yet?—A. Well, as I say, I'm new on the job, but we always got mail sent to the office, and whatever directions were in there that had to be paid attention to—

Q. To whom were those communications addressed?—A. Well, they are usually addressed to Mr. Bary. They are sent to the office, or the post office box.

Q. Now, you stated you were membership director of the Denver section for approximately how long?—A. For approximately nine months, I'd say.

Q. And under whose direction were you working then?—A. I'd say the same kind of direction.

Q. Were you working under Mr. Bary's supervision and direction?—A. Yes.

211 Q. Was anyone working under your supervision and direction?—A. Well, that, sir, I decline to answer on the grounds that I believe that it would tend to incriminate me.

Q. That it would tend to incriminate you?—A. Yes, sir.

Q. You refuse to give the names of any other people who are working under your direction as membership director on the grounds that it would tend to incriminate you; is that correct?—A. I don't refuse; I decline. I want to make—

Q. Let's not play with words, Mr. Kleinbord. Then you decline. We'll go along with you on that.—A. Yes, sir.

Q. You decline to answer on the grounds that it would tend to incriminate you?—A. That's correct. I'd like to state my reasons for that.

Q. Well, just a minute now, Mr. Kleinbord. We went down and had an understanding with Judge Symes last Friday morning, and I want to read to you from the transcript what his instructions to you were in this respect.—A. I think I remember them clearly.

Q. Just a minute. I'd like to inform you in that regard and then ask you the same question. Here is a transcript of the testimony. I stated to the Court:

"The Court has under consideration the conduct of Paul Meir Kleinbord.

212 "The Court: Is he here?

"Mr. Kleinbord: Yes, sir.

"Mr. Nevans: Mr. Goldschein read at length the full transcript of the testimony of Mr. Kleinbord this morning. Now, I wish to call to the Court's attention in particular the misapprehension under which Mr. Kleinbord is laboring—namely, that he can, when asked a question by the Grand Jury which he feels might incriminate another person related to him in no way or between whom no form of privilege exists,—he feels that he can refuse to answer such questions on the ground that they would tend to incriminate a friend of his: that it would incriminate, as he states it, his political philosophy, his principles. Now, if the Court finds that Mr. Kleinbord is not in contempt up to this time, on behalf of the Grand Jury we request that he be instructed in regard to that matter that he must answer any questions directed to him concerning other individuals."

Then an excerpt of your testimony before the Grand Jury in that connection was read.

"The Court: Mr. Kleinbord, you are directed to answer those questions. You are instructed that this freedom from *self-incrimination* applies only to you and not to other people. If you know anything about anybody else and are asked proper questions, you must answer.

"Mr. Kleinbord: Yes, sir.

213 "The Court: All right, that settles that. Will you do that?

"Mr. Kleinbord: Yes, sir. I would like to make a short statement."

Then you made a statement about being there under protest because you were under doctor's orders. Now, will you read the last question to Mr. Kleinbord?

(Question read as follows: "You refuse to give the names of any other people who are working under your direction as membership director on the grounds that it would tend to incriminate you; is that correct?")

A. That's correct.

Q. Not on the grounds it would tend to incriminate them, but on the grounds it would tend to incriminate you?—A. Myself, that's right. I would like to point out that since I

was here last week I have tried to study up on the United States Constitution and the Bill of Rights and I see here, it states here clearly in Article V that—

Q. Now, just a mintue.—A. —that a witness cannot—

Q. Just a minute, please. This Grand Jury, I beleive, is as familiar with the Constitution of the United States as you are, and this Grand Jury does not presume to determine whether you shall answer certain questions—that's a matter for the District Court of the United States, Judge Symes.

Judge Symes has ruled in that respect and if you are
214 unwilling to comply with his ruling we will have no alternative but to take you before Judge Symes and have him instruct you again or take whatever action against you he deems necessary. There are, however, other questions that we would like to have you answer.—A. I would like to say, sir, that I am aware of Judge Symes' ruling. I am also aware of Congressional investigation of all kinds, and I am aware of an indictment of twelve leaders of my party; I am aware of an attempt at assassination of one of the leaders.

Q. Just a minute, Mr. Kleinbord.—A. And in view of this—

Q. Just a minute, now. We want to be fair with you. I think you made a statement at length previously concerning these indictments. This Grand Jury, these people here can not give you their time to permit you to expound on your political philosophy or on your personal views. You will have to do that a group that is more receptive. This Grand Jury is investigating certain matters and these people are giving freely of their time for that purpose and we cannot call them to listen to the personal views of everyone that comes in here. Now, proceeding with these questions.

Mr. Kleinbord, prior to your becoming membership director of the Denver section of the Communist Party of Colorado, did you hold any official position in the Communist Party of Colorado?—A. No, sir.

215 Q. Your answer is no?—A. "No, sir."

Q. How long were you a member of the Communist Party of Colorado before becoming membership director?—A. When I came out of the hospital I was a member there, and I was a member afterwards.

Q. Approximately how long were you?—A. Altogether about three years.

Q. Approximately three years. You held no position in the Communist Party of Colorado prior to becoming a membership director; is that correct?—A. That's correct.

Q. Who appointed you membership director of the Communist Party of Colorado?—A. I decline to answer that question on the grounds that it might tend to incriminate me.

Q. Incriminate you for the violation of a federal offense, Mr. Kleinbord?—A. I believe that the answer to that question would tend to incriminate me.

Q. For the violation of a Federal offense?—A. Yes, sir.

Q. Who appointed you section organizer for the Denver section of the Communist Party of Colorado, Mr. Kleinbord?

—A. I decline to answer that question on the same
216 grounds, that it may tend to incriminate me.

Q. For the violation of a Federal offense?—A. I don't know; it may.

Q. You are not certain, but you think it might; is that correct?—A. That's right.

Q. How many branches of the Denver section of the Communist Party are there?—A. I decline to answer that question on the grounds that it may tend to incriminate me.

Q. What are the names of the branches of the Denver section of the Communist Party of Colorado?—A. I decline to answer that question on the grounds that it may tend to incriminate me.

Q. While you were membership director of the Communist Party of Colorado were you responsible for the collection of dues of individual members of the Denver section of the Communist Party of Colorado?—A. I say no categorically.

Q. Explain what you mean by your answer, "no categorically."—A. My previous testimony in this court shows that I have already explained that I only collected dues from branches, not from individuals.

Q. Who were the persons that you collected dues from the various branches of the Denver section of the Com-
217 munist Party of Colorado from?—A. I decline to answer that question on the grounds that it may tend to incriminate me.

Q. Do you know the names of persons from whom you

collected dues, in your position as membership director of the Denver section of the Communist Party of Colorado?—A. I decline to answer that question on the same grounds, that it may tend to incriminate me.

Q. Who now has succeeded to your duties as membership director of he Denver section of the Communist Party of Colorado?—A. I refer once again to my previous testimony where I stated that that hasn't been settled yet.

Q. It has not been settled up to the present time?—A. No, sir.

Q. Who is taking care of the duties of the membership director at the present time?—A. I do not know.

Q. Are you?—A. I am not.

Q. You do not know the name of the person who is?—A. No, I do not.

Q. When did you last discuss with Mr. Arthur Bary who was to assume those duties?—A. About a month ago.

Q. About a month ago? Mr. Kleinbord, have you
218 ever held any other position in the Communist Party of Colorado than section organizer and membership director?—A. None to the best of my knowledge and remembrance; I don't believe I have.

Q. Have you ever served on any committees of that organization?—A. Oh, I think I have, yes.

Q. Name the committees, please.—A. I decline to answer that question on the grounds it may *incriminate* me.

Q. How many such committees were there.—A. I don't recall. I have served on committees, but I don't recall how many.

Q. Approximately, Mr. Kleinbord? Would it be five, would it be fifty, would it be twenty-five, would it be a hundred?—A. Well, in the course of the work there are many committees established and I've been on all kinds of committees.

Q. I beg your pardon?—A. I say, in the course of the work all kinds of committees are established. The work changes from day to day, week to week, and I have served on many committees. I feel that is the best answer that I can give to that question.

Q. All right, let's go at it another way. In the year 1948

how many committees have you served on, approximately?—

A. I believe the best answer I could give is the one
219 that I just gave.

Q. You don't remember?—A. No, I don't remember.

Q. In the month of August, 1948, how many committees did you serve on, Mr. Kleinbord?—A. I can't recall.

Q. Did you serve on any committees in the month of August?—A. Oh, yes.

Q. Would you say you had served on three committees in the month of August?—A. I'd say so, sure.

Q. Would you say that you had not served on more than ten committees?—A. All right.

Q. The figure then would be between three and ten; is that correct?—A. That's right.

Q. Well, could you approximate the figure then between three and ten?—A. Well, I mean I don't quite grasp your line of reasoning. You know, I don't quite understand the question you're trying to put here. I've answered that I have served on committees; perhaps there haven't been any more than ten, and then I'd place it that way, but I've served on committees.

Q. During the month of August, 1948?—A. Yes,
220 sir.

Q. Will you state to the Grand Jury the names of those committees?—A. I decline to answer that question on the grounds it may tend to incriminate me.

Q. Very well. Mr. Kleinbord, you recall in court Friday morning that the United States Attorney on behalf of the Grand Jury made a request to the Court that you be directed to answer certain questions; do you recall that?—A. The Court directed me to answer to the best of my ability and said that he couldn't direct us to answer specific questions. I recall that.

Q. That's correct; that is, if you didn't know the answers, of course you couldn't give the answers. I'm going to ask you those questions now, Mr. Kleinbord. The first question: How many clubs, cells, or subdivisions of the Denver section of the Communist Party of Colorado are there functioning at the present time?—A. I decline to answer that question on the grounds that it may tend to incriminate me.

Q. State the names of each of those clubs, cells, or subdivisions of the Denver section of the Communist Party of Colorado.—A. I decline to answer that question on the ground that it may tend to incriminate me.

Q. Who are the officers of each particular club, cell,
221 branch or subdivision of the Denver section of the Communist Party of Colorado?—A. I decline to answer that question on the ground that it may tend to incriminate me.

Q. State the names and addresses of each of the officers of each of the particular clubs, cells, or subdivisions of the Communist Party of Colorado?—A. I decline to answer that question on the ground that it may tend to incriminate me.

Q. State the names and addresses of all the members of each particular club, cell, or subdivision of the Denver section of the Communist Party of Colorado that you know?—A. I decline to answer that question on the ground that it may tend to incriminate me.

Q. To your knowledge, Mr. Kleinbord, have any records, documents, or books of the Communist Party of Colorado been destroyed or secreted since this Grand Jury began its investigation?—A. To my knowledge, no.

Q. Have you heard that any books, records, documents of the Communist Party of Colorado have been either destroyed or secreted since this Grand Jury began its investigation?—A. To my knowledge, no.

Q. You have heard of no such thing?—A. I have not.

Q. To save the time of the Grand Jury, Mr. Klein-
222 bord, instead of questioning you at length concerning meetings of the Denver section of the Communist Party of Colorado and of branches of the Denver section of the Communist Party of Colorado, I will ask you on behalf of the Grand Jury whether you will testify to the Grand Jury concerning your attendance at such meetings, and who was present at such meetings?—A. I decline to answer that question on the grounds that it may tend to incriminate me.

Q. Just to make the record clear in this respect, did you attend a meeting of the Communist Party at 2802 Welton Street on March 9, 1948—2802 Welton Street, Denver, Colorado, on March 9, 1948?—A. I wish I could answer that and say yes, but I don't remember. I would like to claim privilege on that.

Q. Very well. I beg your pardon.—A. Therefore, I would like to claim privilege on that.

Q. Now, if you don't remember, Mr. Kleinbord— —A. All right.

Q. If you don't remember, you don't. Have you ever attended a meeting of the Communist Party at 2802 Welton Street, Denver?—A. Yes.

Q. When?—A. When?

Q. Yes.—A. I have attended any number of them
223 there, yes.

Q. How many would you say you have attended there?—A. Oh, perhaps fifteen; I don't know.

Q. Over what period of time? The three years you have been a member?—A. That's right.

Q. When was the last meeting you attended at 2802 Welton Street?—A. It has been quite a while. I don't think it has been as close as March; I don't think it has. It has been a number of months.

Q. Who was present at that meeting?—A. I decline to answer that question on the grounds that it may tend to incriminate me.

Q. Who presided at that meeting?—A. What meeting are you speaking of?

Q. The meeting you are speaking of.—A. I'm speaking of any number of meetings which I have admitted I have attended.

Q. No; just a minute. I am speaking of the last meeting of the Communist Party that was held at 2802 Welton Street, Denver, Colorado.—A. I decline to answer that question on the grounds that it may tend to incriminate me.

Q. Now, I asked you who presided.—A. Correct.

Q. Did you preside?—A. I may have; I don't re-
224 member.

Q. Mr. Kleinbord, are you employed at the present time?—A. I hope so.

Q. By whom?—A. The Heiland Research Corporation Machine Shop.

Q. I beg your pardon?—A. Heiland Research Corporation Machine Shop.

Q. Where is that located?—A. 130 East Fifth Avenue.

Q. Denver?—A. Yes.

Q. Do you receive any remuneration from the Communist Party of Colorado for your activities?—A. No, I do not.
Q. You do not?—A. No, sir.

Mr. Nevans: Mr. Kleinbord, that's all for now. Do any of the members of the Grand Jury have any questions to ask him at this time? If not, you will be recessed subject to call. You are not excused, Mr. Kleinbord.—A. I understand.

(Whereupon the witness left the grand jury room.)

Filed October 6, 1948.

[Proceedings, October 6, 1948.]

Denver, Colorado, October 6, 1948, 12:00 o'clock noon.
45 Before: The Honorable J. Foster Symes, United States District Judge.

Present: The United States Grand Jury; Mr. Max H. Goldschein, Special Assistant to the United States Attorney General; Mr. Joseph N. Lilly, Assistant United States District Attorney; Mr. E. E. Nevans, Assistant United States District Attorney; on behalf of the United States. Mr. Samuel D. Menin, Attorney at Law; on behalf of Bary, Kleinbord and Rogers.

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46 The Court: Call the roll of the Grand Jury.

(Grand Jury roll called; nineteen members present.)

The Court: Mr. District Attorney, have you something to present to the Court?

Mr. Goldschein: Yes, may it please your Honor. The Grand Jury has some presentments which they would like to return in open court at this time.

The Court: Very well.

Mr. Goldschein: Mr. Foreman.

The Foreman of the Grand Jury: Your Honor, I have three presentments to present to you, and may I at this time ask if we can excuse the jury for lunch.

The Court: You mean right away?

The Foreman: Right away.

The Court: This will be through in just a minute. Do we need them any more now that this presentment is given?

Mr. Goldschein: No, sir.

The Court: Ladies and gentlemen of the Jury, you may go now, and come back at such time as your Foreman directs.

(Grand Jury excused from the courtroom.)

The Court: These presentments are rather long. Will the District Attorney please make a statement as to what they are?

Mr. Goldschein: Yes, may it please your Honor. The three presentments are, one against Arthur Bary, another against Paul Meir Kleinbord, and the other against
47 Tracy Roy Rogers. These three men were witnesses who appeared before the Grand Jury and refused to answer questions propounded to them. On some of these questions they claimed privilege against self-incrimination; on others they just bluntly refused. These witnesses were brought before your Honor in open court and purged themselves of the contempt at that time and were instructed by the Court to go back and answer certain other questions, some of which were stated here in open court by Government counsel—that is, questions that they wanted the defendants to answer before the Grand Jury. The Court instructed these witnesses to go back before the Grand Jury and be prepared to answer questions. These witnesses were again recalled before the Grand Jury and refused categorically to answer all or most all of the questions propounded to them in open court, in addition to many other questions propounded to them, which were, of course, proper questions.

The Court: Are these parties all in Court?

Mr. Menin: Yes, your Honor.

The Court: Is Mr. Bary here?

Mr. Goldschein: They are all here and represented by counsel.

The Court: Have you any statement to make, Mr. Bary?

Mr. Menin: As I understand it, if I may speak on behalf of Mr. Bary, *thse* presentments will permit the defendants to have a hearing before the Court, and at that time
48 the defendants will offer such evidence that they feel advisable.

The Court: How about Mr. Kleinbord?

Mr. Menin: I believe the situation is the same with Mr. Kleinbord.

The Court: And Mr. Rogers?

Mr. Menin: The same situation.

The Court: All right. What next, Mr. Goldschein? Do you want an order on these?

Mr. Goldschein: Yes, may it please your Honor.

The Court: We will issue an order for them to show cause why they should not be held in contempt of this Court, in accordance with the prayer of these presentments, and set this down for Friday morning, if that's convenient.

Mr. Menin: May I suggest, if the Court please, I have a matter that has been pending for some time in the state court and it may take me about an hour. It's a short matter and I've got to be there.

The Court: Lets see your calendar for Friday.

How about two o'clock?

Mr. Menin: Friday. That will be fine.

The Court: All right.

Mr. Menin: We, of course, reserve the right, after seeing the presentments, to ask for further time, depending on—I understand they're quite lengthy—depending on what these witnesses are being charged with, to ask for further
49 time.

The Court: They are on notice then to be here Friday next at 2:00 p. m. That's October what?

Mr. Lilly: The eighth.

The Court: Eighth?

Mr. Lilly: Yes, sir.

The Court: All right. These are the men that told me they would answer these questions?

Mr. Menin: As I recall it, they did answer several questions in open court.

The Court: No, I mean they told me they would go up there and answer questions, didn't they? Do you remember?

Mr. Goldschein: Yes, sir; that's what they said, but they refused to do that.

Mr. Menin: There were no specific questions indicated that they would have to answer, as I recall it.

The Court: I know it, but I asked them if they would go up and answer questions. I think the record shows that on at least two of these men, and I'm just asking if these are not the same parties.

Mr. Goldschein: Yes, sir.

Mr. Menin: These are the parties that were previously before the Court, yes, sir, your Honor.

The Court: Do these orders have to be served?

Mr. Goldschein: Yes, sir. We have copies of the presentments together with their individual Grand Jury testi-
50 mony right here ready.

The Court: Do you represent all of these parties, Mr. Menin?

Mr. Menin: I do, your Honor.

The Court: All right, then service on him will be sufficient, I assume. Is there anything more?

Mr. Goldschein: No, sir, that's all.

The Court: If not, Court will stand adjourned.

(After court adjourned and at 12:10 p. m., the following statements were made.)

Mr. Goldschein: For the record, we are giving Samuel D.

Menin copy of the order, a copy of the presentment, together with a copy of the Grand Jury testimony in this matter, of Arthur Bary, Paul Meir Kleinbord, and Tracy Roy Rogers.

Mr. Menin: Let the record show that these papers have been served upon me as counsel for the persons named; that we waive no right to attack this manner of service and waive no rights whatever under any laws of the United States or under the rules of procedure as to whether or not this service is proper.

Filed October 13, 1948.

[Proceedings, October 12 and 13, 1948.]

Denver, Colorado, October 12 and 13, 1948, 10 o'clock a. m.

55 Before: The Honorable J. Foster Symes, United States District Judge.

Appearances: For the Plaintiff: Mr. Max H. Goldschein, Special Assistant to the United States Attorney General; Mr. Joseph N. Lilly, Assistant United States District Attorney; Mr. E. E. Nevans, Assistant United States District Attorney; For the Defendants: Mr. Samuel D. Menin, Attorney at Law.

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57 The Court: United States against Arthur Bary, hearing on order to show cause.

Mr. Menin: If the Court please, at this time Arthur Bary desires to request the Court—

The Court: Desires what?

Mr. Menin: Desires to request the Court to rule on a petition filed by him for Your Honor to disqualify yourself in this matter. After this matter, there are some other motions we would like to dispose of before this hearing.

The Court: What are your motions?

Mr. Menin: We have this petition for disqualification of Your Honor and a request for a jury trial. We would like to be heard on the request for a jury trial,—

The Court: All right, go ahead.

Mr. Menin: —a motion for continuance, and, of course, the answer to the order to show cause.

On the question of the petition for Your Honor to disqualify yourself—

The Court: Where is that? I don't see that.

Mr. Menin: The witness Arthur Bary has filed a petition.

The Court: I have a motion for continuance by all three of the defendants, motion for continuance of the cases.

Mr. Menin: A joint motion for continuance, yes, Your Honor.

58 The Court: Is that what you want to discuss now?

Mr. Menin: No, I desire to discuss first the petition for Your Honor to disqualify yourself in this proceeding.

The Court: Where is that? Just a minute; let me read it.

I don't think this complies with the statute, Mr. Menin.

Mr. Menin: Well, that is the motion presented by the defendants or the witnesses here,—

The Court: What?

Mr. Menin: —and supported by the witnesses' affidavits.

The Court: I know, but it doesn't comply with the statute in regard to disqualification.

Mr. Menin: Well, it does set forth the reasons that these witnesses feel that they will not receive a fair and impartial hearing before Your Honor.

The Court: That isn't sufficient. There are certain requirements in the statute that must be complied with that are not in here, so this motion will be denied.

Mr. Menin: We ask leave to file an amended motion, if the Court please.

The Court: You should have read the statute before you filed this. If you had you would have seen that it doesn't comply with the statute.

Mr. Menin: Save an exception.

59 The Court: All right, what's next?—motion for continuance?

Mr. Menin: We have a request—

Mr. Goldschein: Your Honor, we are discussing all three, I take it, the motions in all three cases at the same time; they are all similar?

The Court: Yes.

Mr. Menin: Well, on the question of the request for jury trial, all three of them are filed together.

Now, Your Honor will note that in Title XVIII, Section 401, United States Code, which is the proceeding under which the presentment and show-cause orders were returned by the Grand Jury and signed by Your Honor, that even though the show-cause order and the presentments refer to civil contempt, nevertheless, it refers to contempt under Title XVIII, Section 401. Now, under Title XVIII, Section 401, which is Chapter 21 of Title XVIII of the U.S. Code, entitled, "United States Code, Crimes and Criminal Procedure, Contempts Constituting Crimes," Section 401 immediately under that sets forth three different types of contempts which constitute crimes. It is impossible to determine from the show-cause order here, as well as from the presentment of the Grand Jury, just what acts constituted the contempt, but we assume it is one of the three under Section 401, which is what the Government alleges is the section under which they are proceeding. Chapter 21 says "Contempts constituting
60 crimes," therefore under the law as we understand it these three different statements are the various types of contempt which constitute the crimes now charged against these witnesses. The first is misbehavior of any person in the presence of the Court. That is, a Court may have power to punish, by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."

Now, that is one crime constituting contempt.

"(2) Misbehavior of any of its officers in their official transactions."

That's another crime constituting contempt.

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Now, we assume, and I think we may properly so assume from what has occurred here, that possibly the Government, although they haven't indicated which one of the three, is proceeding under (3) of Section 401.

The Court: Those sections don't tie in. They are two different sections.

Mr. Menin: 401 is what the Government has alleged here. "Civil contempt, Section 401, Title XVIII, U. S. Code."

The only Title XVIII, U. S. Code, is this Title XVIII, Section 401. They call it "civil contempt." It doesn't make any difference what they call it; it's what the law says, and the law says it is a crime constituting contempt. Now, if this is a crime—

The Court: Have you read the last paragraph on that page, page 2200 there?

Mr. Menin: Yes, but that's under another section; that's 402. Your Honor will note that the presentment says, "Civil contempt, Section 401."

The Court: Where is the order to show cause?

Mr. Menin: It doesn't refer to Section 402. Does Your Honor have a copy of the presentment there?

The Court: Where is the order to show cause?

401 is civil contempt, isn't it, Mr. Menin?

Mr. Menin: No, Your Honor. The Code specifically provides that Chapter 21 deals with "contempts constituting crimes"; it is entitled "Contempts Constituting Crimes," and Section 401, "Power of Court."

"A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior—" And it lists the three different types, and we assume that they are proceeding under (3) under Section 401.

Now, the mere fact that they call it a civil contempt I don't think makes very much difference. The fact is what the law says it is, and the law says it is a criminal contempt.
62 Not only that, the law says it is a crime. Now, if it is a crime under the Constitution of the United States, as set forth in our request for our jury trial, that Amendment No. 6 of the Constitution very clearly says that in all criminal prosecutions, and this statute says this is a criminal prosecution, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury."

Article III, Section 2, Paragraph 3, of the United States Constitution says: "The trial of all crimes except in cases of impeachment shall be by a jury."

The Court: Where is that?

Mr. Menin: That is in the Constitution of the United States. Now, here they elect to proceed under a contempt which constitutes a crime. Since they have elected to do that, then we are now in court, if the Court please, under a presentment which charges an offense, namely, the offense of contempt as set forth in Title XVIII, Section 401, and in view of the fact that this raises issues of fact we feel that since the Code specifically calls this a crime and the Constitution specifically states that in all criminal prosecutions—and that's what we are here for now, to face a criminal prosecution—the accused shall enjoy the right to a speedy and public trial by an impartial jury, and also under the Constitution the trial of all crimes—and this is a contempt which con-
63 stitutes a crime under this section—the trial of all crimes, except in cases of impeachment, shall be by a jury.

Now, all we are asking is that these parties be granted a jury trial in accordance with the law of the land, and we think that in view of the procedure followed by the prosecution in this matter, by the Government, and since they have elected to proceed under the criminal procedure and since they have

elected to proceed under a section which makes this a crime, then we are entitled to protection under the law of the land, namely, we are entitled to the Government's complying with the provisions of the Constitution of the United States, and we think that the Constitution is as applicable to the Government as it is to the defendants or the witnesses in this case, and therefore we feel that the Court, in view of the procedure that they have followed, must grant these defendants a jury trial because there is an issue raised here which must be decided, and we ask, and do not waive any right that we have to have a jury pass on these proceedings, and we think we have that right under the law of the land.

The Court: Have you finished your argument on that?

Mr. Menin: Yes, Your Honor.

The Court: All right, what has the Government to say?

Mr. Goldschein: May it please Your Honor, the nature or distinguishing feature between contempts, civil and criminal, is inherent in the punishment meted out by the
64 Court. The presentment returned by the grand jury sets out very specifically the matter of which it complains. The grand jury is an arm of this court and a contempt committed in the presence or so near thereto as to obstruct the administration of justice constitutes a contempt in the actual presence of the Court and punishable summarily. The only provision for the trial of contempts by a jury is where an Act of Congress provides for it.

Now, in the Gompers case, may it please Your Honor, 221 U. S., Gompers vs. The Bucks Stove & Range Company, the Court distinguishes between civil and criminal contempt, in substance saying that when the dignity of the court is to be vindicated and the Court sentences a man to a specific term in jail, the contempt being punitive is a criminal contempt. Where the Court sentences a defendant to an indefinite term in jail until such time as he purges himself of contempt by doing what he was ordered to do and at that time being released, it is civil contempt.

Now, here is what the Court, in the Gompers case, said:

"If it is for civil contempt the punishment is remedial, and

for the benefit of the complainant. But if it is from criminal contempt the sentence is punitive, to vindicate the authority of the Court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings, have resulted not only in the im-
65 position of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the Court's order."

Citing in re Nevitt, 117 Federal Reporter 451, Justice Sanborn is quoted as saying: "He carries the keys of his prison in his own pocket."

Continuing: "He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."

Now, there is your characterization between civil and criminal contempt. The nature of this proceeding is that the defendants who appear here this morning were witnesses before the grand jury and refused to testify on matters that the grand jury was making inquiry into. They were brought before the Court here and were instructed by the Court that they must answer those questions. As a matter of fact, in
66 the matter of Arthur Bary the questions that would be propounded to him in the grand jury room were made known to him in court and the Court instructed him to prepare himself to answer those questions. He went before the grand jury again and refused to answer the questions.

Now, the grand jury, after once having been recessed because of the obstructionist tactics of the defendant, returned a presentment in this court stating that the witness Bary still persists and is adamant in his refusal to give the testimony

required by this grand jury, and the grand jury returning this presentment does not say to Your Honor that, "We ask that this man be punished for his refusal"; this grand jury has said to the Court in its presentment that, "We want the coercive power of this Court invoked to compel this witness to testify."

Now, the grand jury was again recessed because the witness refused to testify. We don't think at this time, and the grand jury did not think, that a specific punishment would answer the problem. They are asking for civil contempt. They want the aid of this Court, of which they are a part, to help them in compelling the witnesses who are required as a matter of law to testify. They are asking the Court to do that very thing.

Now, I don't know of a presentment that could be drawn with more detail, that could be more specific in its allegations,
67 that could have more details of what this grand jury wants and expects of them. The presentment sets out the matter that they are investigating so the defendant will know that he, not being a Federal employe, cannot be involved in that investigation as a defendant.

Now, the power of a Court to punish for contempt or incarcerate a witness until he purges himself of that contempt is inherent in the power of the Court. The grand jury being an arm of that court has been decided in too many cases for me to cite here now, beginning with the Camorata case from the Third Circuit, the Ellison and Conn cases from the Third Circuit, the Meckley case from the Third Circuit, all of which cases went to the Supreme Court, certiorari being denied. Now, to say that at this time because there is a statute giving the Court power to use its coercive power to compel a witness to testify, that that then becomes a crimnial charge and requires a trial by jury, is ridiculous. There is no case, there is no citation that the defendant can call Your Honor's attention to that requires a contempt of the grand jury to be tried by a jury.

Section 385 of the old Code, most of which has been transferred, may it please Your Honor, provides as follows: "The Federal Courts shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment,

at the discretion of the Court, contempts of their authority.

Such power to punish contempts shall not be construed
68 to extend to any cases except the misbehavior of any persons in their presence or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said Court in their official transactions, and the disobedience or resistance to any such officers or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of said Court."

Now, that has been carried forward. If the Court wants to hear any further argument from me, I will continue.

The Court: Whatever you wish to say I'll be glad to hear.

Mr. Goldschein: All right, sir. Continuing further from this Gompers vs. The Bucks Stove & Range Company, 221 U. S. 443, the Court there said further:

"The distinction between refusing to do an act commanded, —remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.

There is your distinction between your criminal contempt and your civil contempt.

Now, in the last case that went to the Supreme Court on the question of contempt, the United Mine Workers case, in that case the Supreme Court said that the defendant
69 must have some notice of the type of contempt that he is to meet.

The Court: That is in the Lewis case.

Mr. Goldschein: That is in the Lewis case. Now, there isn't any question but what this presentment, specifically following that case, calls upon the coercive powers of the Court to *compell* the witness to make answer to the questions propounded to him by the grand jury. In addition to specifically setting forth that that is civil contempt, it was written on the face of the presentment, "Civil Contempt," so the defendant may know it is civil contempt. Regardless of

whether the wording "Civil Contempt" up there is surplusage, it is the relief that was asked for that determines the distinction between criminal and civil contempt, and had it been criminal contempt, had the Government asked for the punitive power of the Court to be invoked to punish him for his obstructing this grand jury, they still wouldn't be entitled to a trial by jury; of course not. The statute specifically says that contempt of the Court in the actual presence of the Court, or so near thereto as to obstruct the administration of justice, is contempt of court and punishable summarily. Why, that is Section 42 of the criminal rules. Now, this isn't criminal contempt; it's civil contempt. They say because it isn't criminal now that the defendant is entitled to a trial by jury. That, of course, isn't sound.

70 Mr. Menin: If the Court please, counsel makes a very elaborate argument on an issue that isn't raised by myself. I concede that contempt committed in the presence of the Court may summarily be punished by the Court, of which I am well aware. However, this is a somewhat different proceeding; this is a proceeding brought by the Government. They chose the method of procedure, and they chose a method of procedure different from what has ever been done before.

The case that counsel cites is entirely different from the situation here, for this reason: Here they chose to proceed under Title XVIII of the United States Code. There was no contempt committed in the presence of the Court, and I might say that counsel even misquoted the record when he stated that the Court ordered this defendant or this witness to testify to certain matters.

The Court: Did what?

Mr. Menin: I have the record here before me and here is what the Court told the witness Bary. Mr. Nevans at the time stated to the Court certain questions that he wanted the witness to testify to. At that point the witness had been purged of all contempt. Then Mr. Nevans makes the statement to the Court that he wants the Court to instruct the witness to testify regarding certain questions, and these questions are here set out, and here is what the Court said to Mr. Nevans:

71 "What grounds have you to believe that he can answer those? I can't instruct him to answer."

Now, that's what the Court told him. There was no instruction by this Court whatever, despite the statements made by counsel, that this man had to answer any specific questions. He went into that grand jury room and they began to interrogate him, then they came upon questions which he felt he had a constitutional right to refuse to answer. As to those questions, this Court has never passed upon them and has never instructed this witness to answer them.

The Court: Just a minute. Didn't he tell me here in open court that he would answer the questions?

Mr. Menin: He made the statement—

Mr. Goldschein: Did the Court ask me the question?

The Court: No, I am asking Mr. Menin. Didn't he tell me here in court that he would answer the questions?

Mr. Menin: That he would answer questions that he could. Then Mr. Nevans pointed out to him, or pointed out to the Court, that he wanted this witness to answer the following questions:

"Mr. Nevans: All of these questions relate to the Communist Party of Colorado. The first question: How many clubs, cells, or subdivisions of the Communist Party of Colorado are there functioning at the present time in the State?

72 "Second: Who are the officers of each particular club, cell, or subdivision of the Communist Party of Colorado? State their names and addresses.

"Third: State the names and addresses of all members of each particular club, cell, or subdivision of the Communist Party of Colorado.

"Fourth: Produce the book or books in which the dues paid by each member of each club, cell, branch or subdivision of the State organization are recorded, or if you do not have custody or possession of such books, state to the grand jury who does have possession and custody of such books.

"Mr. Bary being the chairman of the Board and the presi-

dent of the Communist Party of Colorado, an organization which is functioning under his direction, should, in the belief of the grand jury, be able to answer all of these questions.

"We would like to have the Court so instruct him at this time.

"The Court: What grounds have you to believe that he can answer those? I can't instruct him to answer. He is on notice, however, that those questions will be asked him and that he should be prepared to give his answers if he cares to. Of course, if he refuses he will have to come in here and have another hearing."

Now, we now stand here, first, having been purged of contempt, then the witness goes back to the grand jury;
73 he is asked certain questions. The Court did not instruct the witness to answer the questions that would be asked. In fact, the Court specifically said that he can't instruct him to answer those questions. And the witness goes back into the grand jury room and certain questions are propounded to him and the witness refuses to answer them on certain constitutional grounds, then along comes the grand jury, without a situation being created where he is instructed to answer those questions, and brings a presentment to the Court. In this presentment there is no statement whatever that the witness has refused to follow the instructions of the Court; the presentment merely sets out the same list of questions which the Court indicated that he didn't know whether Mr. Bary could answer those questions and refused to instruct Mr. Bary to answer those questions.

Then they proceed under a criminal provisions of the U. S. Code, which criminal provision makes contempt a crime, and we submit that irrespective of the cases that were read by counsel, which went off on an entirely different issue, we submit that this provision of the Code has just become operative and it specifically says that contempt shall now be a crime. It says, "Contempts constituting crimes," and they are now before the Court on this alleged contempt charged by an alleged presentment which doesn't actually say anything, and they want this Court now to summarily,
74 although they are giving us a hearing first—now they say the Court may summarily find this man guilty of

contempt. Now, which is it? If we are entitled to a hearing under the Code, if this is a criminal procedure under the Code, as it appears to be—and they chose the nature of the proceeding, not us—then we are entitled to a jury trial to pass on these issues; if we were not entitled to a jury trial, if we were not entitled to a presentment, then all of this is a lot of surplusage and the Court could summarily find this man guilty of contempt. But they chose the method and they chose the procedure, and I submit that they, having chosen the procedure, having proceeded under the criminal statutes of the United States, and they have made this matter a matter of issue where we had to file an answer which must be determined upon a hearing, and when it is determined upon a hearing we submit that we are entitled to a jury trial on these issues.

The Court: On page 92 of this record the Court said: "If you don't do that, of course you'll be subject to the pains and penalties that the law provided in such cases for contumacious witnesses."

If that isn't telling him to answer, I don't know what is.

Mr. Menin: The Court hasn't made any specific instruction on any question.

75 The Court: The Court doesn't have to instruct him all the time; that's for him to decide himself.

Mr. Menin: All right.

The Court: Now, what else?

Mr. Menin: They raise the issues; they bring in a presentment and, as we say by our answer, we have an issue now before the Court, and we submit that when they raise the issue—and that presentment shows the method of procedure, and they proceed under the criminal statutes, and the criminal statutes say that contempt, under Section 401, shall constitute a crime, as Your Honor may well see—

The Court: I don't think it does do that, but go ahead. You've read it to me once; I've heard your argument on that.

Mr. Menin: Well, I don't know what it says if it doesn't

say that. I may not be the most intelligent person in the world but I think I can read the English language.

The Court: But you haven't read the last section there.

Mr. Menin: But this is under Section 401.

The Court: I say, read the bottom of 402, the last paragraph.

Mr. Menin: "This section shall not be construed to relate to contempts committed in the presence of the Court."

Yes, I concede that.

76 The Court: Read on.

Mr. Menin: Yes, I know what it says.

The Court: What else does it say?

Mr. Menin: But they are not proceeding under Section 402; they are proceeding under Section 401, which is the contempt that constitutes a crime. Under Section 402 there, under the clause that Your Honor is asking me to read now, they don't need a hearing at all.

The Court: That Section 402 says: "This section shall not be construed to relate to contempts committed in the presence of the Court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."

Mr. Menin: Now, if the Court please, I think the defense has a right to rely on the procedure followed or suggested by the prosecution. We have here a presentment of contempt under Section 401, Title XVIII, of the U. S. Code. Now, if they are not going to proceed under that section then I think we are entitled to a continuance so that we can be prepared to defend ourselves under another section, which is

77 not at all the law as it now is before this Court. We are before this Court under Section 401, not Section 402.

They specifically state that in their presentment. Now, they can't blow cold and then come in and say, "We made a mistake and now we want to go under another section." Our answer is predicated on Section 401, not Section 402.

The Court: Right at the top there it says that Section 401 is "Power of Court," 402 is "Criminal Contempts," so they make a distinction right there in the statute.

Mr. Menin: Yes, and this contempt constitutes a crime.

The Court: Where does it say it constitutes a crime?

Mr. Menin: Right on top, right above that Chapter 21: "Contempts constituting crimes," and that's what they are proceeding under.

The Court: But that last sentence, or that last section eliminates that.

Mr. Menin: That's right, but they have presented us with a presentment under Section 401.

The Court: I understand. You made that argument several times. Now, have you anything more to add?

Mr. Menin: I haven't, but I do think we have a right to a —

The Court: I understand.

Mr. Menin: May I make this observation?

78 The Court: All right.

Mr. Menin: That if they desire to depart from the procedure that they have set out, then we have a right to a document of some kind from the Government showing us under what procedure they now intend to proceed so that we may intelligently defend ourselves against it.

The Court: Is that all you have to say?

Mr. Menin: That's all.

The Court: All right, now, what has the Government to say?

Mr. Goldschein: Mr. Menin is taking me to task for misquoting to the Court; and, of course, a deliberate misquota-

tion is bad. I would like to read to Your Honor just what I said the Court instructed the witness Bary he must do.

The Court: Where is that, what page?

Mr. Goldschein: On page 91. The Court said to Mr. Nevans: "What grounds have you to believe that he can answer those? I can't instruct him to answer. He is on notice, however, that those questions will be asked him and that he should be prepared to give his answers if he cares to. Of course, if he refuses he will have to come in here and have another hearing."

Now, if that isn't an admonition of the Court that he shall prepare himself to answer those questions, I don't know what is.

79 The Court said further: "Of course, if he refuses he will have to come in here and have another hearing. As far as it goes now, I think Mr. Bary, while he was in contempt of the grand jury, has cleared up, has purged himself of this contempt, and on those matters he is discharged. But that doesn't mean, Mr. Bary, that you mustn't answer any further questions that the grand jury asks you and which are proper questions. Now, you've played ball here this morning and helped us out very much, and if you will only take the same attitude when you are called before the grand jury and try to be helpful rather than an obstructionist, we'll get along much better. If you don't do that, of course you'll be subject to the pains and penalties that the law provides in such cases for contumacious witnesses."

Further on down that page the Court said: "All right, now see if you can't play ball and get along here and not have any more trouble. The Court has to exercise its power and will do so without hesitation, but I don't like to send you people to jail. It's hard on me. But we have to do it in order to perform our duty here. So please play ball with the District Attorney and you'll get along better. The mere fact that you may not like the District Attorney to examine you doesn't make any difference. He is an officer of the Government and he is required to perform his duties."

80 If that isn't an obstruction of the Court, with a plea of the Court to please answer the questions, I don't know what is.

Now, I take it that that clears up the misquotation of mine.

May I suggest, may it please Your Honor, for the purpose of the record, that that appears on page 92 of the courtroom transcript of September 24th and was an admonition to Mr. Arthur Bary, the defendant in this contempt proceeding.

The Court: Is that all you have to say?

Mr. Goldschein: That's all. I think the Court pointed out that under the heading of "Contempts constituting crimes" there are two sections. The first one, 401, is headed "Power of the Court." Distinguished from that is the next section, 402, which provides for criminal contempts. Now, the codifiers of the new Title XVIII deliberately made a distinction here between the power of the Court, which we refer to, and the cases referred to as the inherent power of th Court provided for in 401. Those criminal contempts are provided for under 402, and that section sets out what cases shall not be tried or be confined to a trial by jury, referring specifically to the power of the Court under Section 401.

Mr. Menin: There is only one observation I want to make: The proceeding is under Section 402. Of course, we weren't advised of that.

81 Mr. Goldschein: I didn't say we were proceeding under that.

Mr. Menin: That is criminal contempt, and since this new Code now provides that contempt shall be a crime, then I think there is no question about it that we are entitled to a jury trial.

The Court: All right; is that all?

Section 401 gives the Court powers to punish for contempt of certain nature therein specified; Section 402, which is headed "Criminal Contempts," in the last section specifically

eliminates as a criminal contempt "those contempts committed in the presence of the Court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."

In which case that is a holding that the proceeding before us is not a criminal contempt, as it is specifically eliminated from Section 402.

Now, this party has had ample notice on questions that he was to be asked before the grand jury, and when he was in court here once before those questions were read to him by the Court and he stated here in open court that he had
82 refused to answer them and that the record was correct in that respect. Then, when the Court appealed to him to answer those questions, he said that he would, but the information now is—and it seems to be admitted—that he went back to the grand jury room and he refused to answer those questions or any others propounded to him.

Now, I asked you if you had anything more to say, Mr. Menin, so please be seated until the Court finishes.

Mr. Menin: With reference to your remarks—

The Court: Please be seated Mr. Menin.

Mr. Menin: Very well.

The Court: Therefore he is in contempt of this court, and the Court so holds and will now consider the question of the punishment.

Mr. Menin: May I make an observation?

The Court: On what?

Mr. Menin: Your Honor made the statement that these questions were propounded to him—

The Court: Now, the Court has passed upon that, Mr.

Menin. You have plenty of time and I asked you if you had anything more to say.

Mr. Menin: Your Honor, I didn't know you were going to make reference in your decision to the statements that were asked of him before the grand jury. None of the questions that Your Honor has just stated—and I have the record here indicating that those particular questions were not asked of him before the grand jury, and Your Honor is finding him guilty of contempt on matters that Your Honor said that he couldn't order him to answer.

83

The Court: You made that argument before. Will you please be seated?

Mr. Menin: But there is nothing in this——

The Court: Mr. Menin, please be seated.

Mr. Menin: Save an exception to the Court's ruling.

Mr. Goldschein: I am sure that if the Court will hear the witness Bary's statement on his constitutional privilege the Court will determine, as it did before, that Mr. Bary has no constitutional privilege involved here; that the questions mostly pertain to other people and do not apply to him at all. He still claims arbitrarily, after hearing several other witnesses in court, having their attention called by the Court to the fact that the privilege against self-incrimination applies only to them—Mr. Bary was in the courtroom when Jane Rogers was advised of that particular matter by the Court; Arthur Bary was in the courtroom when Miss Wertheimer was advised of that particular matter by the Court; he was in the courtroom when Kleinbord was, and said before the grand jury that he knew about Kleinbord's being advised by the Court that the privilege of self-incrimination applied only to him and didn't apply to his statements with reference to other people.

84

The Court: I understand all that. Is there anything in the record here showing the questions which he has specifically refused to answer?

Mr. Goldschein: It is attached to the presentment, yes, sir.

The Court: Where is the presentment?

Mr. Bary, will you stand up, please?

It appears from this record that you refused to answer certain questions which are set forth in this record of the proceedings before the grand jury. According to this record, you refused to answer them on the grounds that they might tend to incriminate you. Do you still refuse to answer those questions?

Mr. Bary: Yes, sir, I do, Your Honor.

The Court: All right, then the Court finds you in contempt.

Mr. Bary: May I—

Mr. Menin: May I now enter my most vigorous protest to the Court's action at this time in finding this witness guilty of contempt without giving us an opportunity to proceed under the issues that were raised in this case by the presentment, the show-cause order, and the answer filed thereto?

The Court: All right. What order should I make, Mr. Goldschein?

85 Mr. Goldschein: We would like, of course, to have the defendant incarcerated until such time as he decides to answer those questions for the grand jury. The grand jury, I believe, can be recalled within a week or ten days' notice and just as soon as the defendant advises the Court that he will answer those questions the grand jury will be awaiting the call of the Court. The Court was so advised on yesterday when the grand jury recessed, that they are awaiting recall at such time as they would be advised that they can continue with the proceedings.

Mr. Bary: Your Honor please, sir, my name is Arthur Bary and I would like to know if I have the permission of the Court to make a statement before sentence is passed.

The Court: You may.

Mr. Bary: As an American, what has happened here is very simple. I was brought before a grand jury and subsequently before a Federal Court and told, in effect, in my

opinion, "Surrender your constitutional rights or go to jail." I cannot accept this alternative.

In the past few weeks I have seen Americans in this same courtroom denied their rights of freedom of conscience and freedom from self-incrimination. I have seen them torn from their children, sent to jail without bail and without jury trial; but they did not flinch at their test of Americanism, and I can do no less.

86 I do not have contempt for the laws or courts of the United States; on the contrary, I am willing to defend the Constitution of the United States with my life if necessary. My contempt is reserved for the Thomases, the Rankins, the Gerald L. K. Smiths, who would turn our Nation into a great concentration camp. These are the men who are in contempt of this Court and every other court in America. These are the men who would destroy our Nation through their Ku Klux Klan, through their attempts to outlaw a legal political party on the eve of a national election. And to these ranks is added the name of the Attorney General of the United States. These men have used every means at their command to arouse mob hatred and violence against my party and other minorities. They have brought this hysteria to the point where they have succeeded in indicting the entire leadership of my party in a monstrous frame-up.

In the face of this I have been called before the Federal Grand Jury, told to abandon my constitutional rights and open the door for the similar indictment of the entire Colorado leadership of the Communist Party, including myself.

It is not in a spirit of defiance that I have appeared here. My refusal to answer self-incriminating and unconstitutional questions is not based upon the fact that I have anything to hide. The Communist Party is a legal or-
87 ganization and is vigorously fighting the real subservice forces in America who would destroy freedom through terror, violence and white supremacy against the minorities of our Nation.

My refusal to answer these questions is based upon a

few simple but vital facts. In New York a Federal Grand Jury indicts the entire leadership of my party. I believe this to be a frame-up. In Denver, however, another Federal Grand Jury tells us that we must answer questions that will open ourselves up to the same kind of an indictment or go to jail without even the formality of such an indictment.

As a result, a mother is torn from her seven-months-old baby. Bail is denied. Secrecy of grand jury proceedings is ignored. The names and addresses of innocent men and women are published in the newspapers so that they become a target of violence at the hands of organized hoodlums and crackpots, inflamed by a well organized conspiracy against the people who refuse to submit to tyranny.

When I joined the Communist Party I swore to uphold the Constitution of the United States. If I violated this oath I could never face my friends, my neighbors, my family or myself again. This I will never do. I may go to prison; I may spend a long time there. But I take this position in full confidence that the American people believe in freedom and justice for all. There are no exceptions. Americans have learned that freedom is indivisible. The destruction of the rights of a Communist today in-
88 evitably means the destruction of the rights of Catholics, Progressives, Democrats, Republicans tomorrow.

The future is on my side. 150 years ago there were those in America who tried to enslave our Nation through the Alien and Sedition Laws. They were swept from power by the aroused wrath of the American people under the leadership of Thomas Jefferson.

It is with a sense of hopefulness, yet proudly, that I take my stand with Thomas Jefferson when he said, "Resistance to tyranny is obedience to God."

As I have listened here, the proposal that the United States Attorney is making here is actually a proposal that I can be put in jail for life, because it is on the basis that he is now proposing that I be thrown into jail under the threat that if I do not talk I will remain in jail for the rest of my life.

That, sir, is my statement. I want to thank the Court for allowing me the opportunity to present it before judgment was passed. Thank you.

The Court: There is one trouble with your argument, Mr. Bary, and that is that you assume and arrogate to yourself the right to decide what the law is. The Court has instructed you and said several times that it is no crime to be a Communist or to be a member of the Communist Party,
89 but you must know that every citizen must obey the laws of the country as they are enacted, and you can't *errogate* to yourself to decide what questions you shall answer or shall not answer. As I stated before, if any witness in here in any kind of a case had the right to decide whether he should answer questions or not we could not prosecute criminals of any kind and you would be the first to protest against such procedure if it was a case which affected you or your personal property or your friends.

Therefore, the Court cannot take any stock in your argument.

It will be the judgment and sentence of the Court that you be committed to the United States Marshal and be confined until you purge yourself of the contempt in the usual way. So ordered.

Mr. Goldschein: May it please the Court, I would like the record to show that Mr. Bary read from a prepared typewritten statement. I think the record ought to show that.

Mr. Menin: If the Court please, as I understand this procedure here this morning, we filed an answer; we also filed some motions which the Court has not yet passed upon. He has already sentenced the witness. As I have indicated—

The Court: What motion do you want passed on?

Mr. Menin We filed a motion for a continuance. We

also filed an answer that the Court has swept aside
90 and refused to consider and found this man guilty without even considering the matters we have raised and the issues—

The Court: I think I have.

Mr. Menin: —and we want to enter our most vigorous protest to that type of procedure.

The Court: The motion for continuance is denied, the request for a jury trial is denied. Is there anything else, Mr. Menin, that the Court hasn't passed upon?

Mr. Menin: The Court hasn't passed upon our answer; the Court has found the man guilty without even considering the issues in the case.

The Court: I asked the witness—he plead guilty, really. He said he wouldn't answer the questions, so I think that's all that was necessary.

Is there anything more?

Mr. Nevans: Yes, if Your Honor please, the matter of Paul Meir Kleinbord.

Is Kleinbord present?

If the Court please, the Court having disposed of all motions which were filed on behalf of all three—

The Court: Wait a minute. Where are there any papers in the Kleinbord case?

Mr. Nevans No. 2550.

Mr. Menin: If the Court please, I should like, if I may, to press my motion here for a continuance, for the
91 reason that the Court has not given us an opportunity to argue the matters which we have presented in our answer to the presentment and the show-cause order.

The Court: I think the record shows you have argued the question, and the Court asked you two or three times if you had anything more to say and you said you did not.

Mr. Menin: This whole matter was determined on our request for a jury trial, and the issues were never raised in

the case and we were not permitted to submit evidence to justify our position.

The Court: Well, that isn't necessary.

Mr. Menin: Then I take it it isn't necessary that we get due process of law in this court.

The Court: What?

Mr. Menin: Then I take it it isn't necessary to have—

The Court: You may think whatever you wish, Mr. Menin, but the Court isn't here to answer your questions.

Mr. Menin: Very well.

Mr. Nevans If the Court please, this matter of Paul Meir Kleinbord will have to go on at some length. It is now close to 12:15. Would the Court care to recess until this afternoon and take up the matter?

The Court: We will recess until two o'clock.

(Whereupon a recess was taken until 2 o'clock, p. m.)

Afternoon Session, 2 P. M.

92 The Court: Is Mr. Bary in court?

Mr. Lilly: Yes, sir, he is here, Your Honor.

The Court: Will you come forward? Step up here.

Mr. Bary, I have been thinking your case over during the noon recess and I want to ask you if you care to have the record read showing the questions that were asked you and which, according to the record, you refused to answer Do you want to take the witness stand so we can decide whether those questions are incriminating or not?

Mr. Menin: If the Court please, the Court has already passed judgment in this case.

The Court: What?

Mr. Menin: The Court has already passed judgment in this case. There is nothing further that we can do at this time. Now, if the Court is willing to vacate the judgment

and purge this man of this contempt and start all over again, we have no objection.

The Court: I am offering the gentleman an opportunity to state his objections to the questions propounded to him in the grand jury room and which he refused to answer. He has stated that it might tend to incriminate him. He might have some reason which he doesn't care to make public, and he will have the opportunity to state in private to the Court so that the Court could pass on the definite question of whether they were incriminating ques-
93 tions or not. If he wants to avail himself of that opportunity, all right; otherwise, not.

Mr. Menin: I think we may avail ourselves of that opportunity. This comes to me as a surprise, and I would like to consult with Mr. Bary for a few moments regarding this.

The Court: All right, go ahead. Take him out across the hall there.

Mr. Menin: However, I do feel that if this proceeding is to be reopened that the Court should vacate its previous order finding him guilty of contempt.

The Court If the evidence justifies that, I will do it. But if he wants to take advantage of that opportunity he may have the opportunity. I don't want to send him to jail without giving him every opportunity.

Mr. Menin: Very well, I'll consult with him.

The Court: What is the next case?

Mr. Nevans: Paul Meir Kleinbord. Do you wish to take that up at this time?

Mr. Menin: If the Court please, I represent Mr. Kleinbord. If I am going to go out and talk—

The Court: All right, go on out. We'll wait for you. Hurry up. It ought to take you only about two minutes to decide.

Court will be in recess, awaiting Mr. Menin's pleasure.

(Whereupon a short recess was taken.)

94 Mr. Goldschein: May it please Your Honor, since the Court is reopening this hearing in the matter of Arthur Bary, a witness before the grand jury, we would like at this time to offer in evidence the grand jury transcript of the testimony of Arthur Bary as of September 29th, 1948, a copy of which the Court permitted us to append to the presentment returned by the grand jury. The grand jury transcript that I have now in my hand—

The Court: If it is already attached to the presentment, it is in the record.

Mr. Goldschein: A copy of it is.

The Court: You want the original?

Mr. Goldschein: We want the original made a part of the record in this proceeding in this court.

The Court: All right.

Mr. Goldschein: Mr. Menin agreed that this transcript, signed by the certified shorthand reporter of this court, Mr. R. Forest Brenner, is the official copy and may be identified as the original.

The Court: All right.

Mr. Goldschein: Lets mark it Exhibit G-1.

(Whereupon the transcript referred to was marked Exhibit G-1 for identification.)

Mr. Menin: For the purpose of the record, we have agreed that if Mr. Brenner had to testify that he
95 would testify that this is his record, and to save the necessity of having another reporter here while Mr. Brenner testifies, we agree that he would testify that that is the record. I don't admit that it is admissible; we admit that the evidence would be submitted to the Court and the Court could rule on the matter.

The Court: All right.

Mr. Menin: At this time I desire to announce to the Court that the witness Arthur Bary will request that the

Court permit him to have a full and complete hearing on the issues raised by the answers to the order to show cause and the presentment, and unless we can have a full and complete hearing on all of the issues set forth in said answer, then we see no purpose of holding another hearing, for the reason that we would nevertheless be denied due process of law if we could not go into all of the matters raised by our answer to the order to show cause.

The Court: As I understand it, then, he rejects the offer made by the Court:

Mr. Menin: We ask the right to a full and complete hearing on the issues made by the answer which we have filed to the order to show cause and the presentment here.

The Court: What do you mean by a full and complete hearing?

96 Mr. Menin: Well, we have raised an issue in the answer to the—

The Court: What issue?

Mr. Menin: The answer to the presentment and the show-cause order. Now, unless we can have a hearing on the answer submitted, then we are denied due process anyhow.

The Court: I gave you plenty of time to argue it this morning, but if you have any further argument to make on this order to show cause in support of your answer, I'll be glad to hear it.

Mr. Menin: If the Court please, our answer sets up the following:

"1. That the order to show cause and the presentment of the grand jury should be dismissed in that said presentment makes public the secret testimony before the grand jury in violation of the oath of secrecy and in violation of Section 6(e) of the Federal Rules of Criminal Procedure.

"2. That said Arthur Bary in refusing to answer the questions put to him was entirely justified in that said questions were such as were infringing upon his constitutional right to entertain any political view and to speak out those

views or remain silent regarding same as is provided by means of the first Amendment to the Federal Constitution.

"3. That by virtue of the immunity against self-incrimination provided by the fifth Amendment to the United States Constitution, the said Arthur Bary was justified in re-
97 fusing to answer the questions and each of them set forth in said presentment for the reason that said questions and each of them were of such character as to cause reasonable apprehension on his part that an answer to said questions might tend to incriminate him and might expose him to prosecution for a Federal criminal offense or offenses, particularly in view of the following premises and circumstances, to-wit:

"(a) The provisions of Title XVIII, U.S.C., Sections 10-13.

"(b) The indictments returned by the United States grand jury in New York against persons solely because of their membership and activity in the Communist Party. Copies of said indictments are attached hereto as Exhibits A and B, and by reference made a part hereof.

"(c) The findings of the un-American Activities Committee to the effect that the Communist Party is subversive and illegal.

"(d) The designations of the Attorney General of the United States that the Communist Party is subversive and disloyal.

"(e) The executive order issued by President Truman on March 22, 1947, designating the Communist Party as disloyal.

"4. That the Government by reason of the first Amendment to the United States Constitution has no right to inquire into the political views and beliefs of any person.

98 "5. That the presentment and show-cause order be dismissed for the reason that the entire proceeding herein attempts to place in disrepute and to cause the public to be prejudiced against a legal political party on the eve of a political election and thus renders ineffectual the efforts of the officers and candidates of said political party and

serves to prevent the people of Colorado from having a free choice in the election.

"6. That the presentment and show-cause order should be dismissed in that the questions asked are not prefaced by any reasonable or sufficient showing as to the object of the inquiry being pursued by the grand jury.

"7. That the presentment and show-cause order should be dismissed for the reason that there is no *shoing* as to the real nature of the matters under inquiry.

"8. That the presentment and show-cause order should be dismissed for the reason that they fail to disclose any violation of Title XVIII, Section 401, U.S. Code, in that it fails to show any order of court was violated."

Now, relative to the matters which raise questions of law, the first point of the presentment of the grand jury should be dismissed in that the presentment makes public secret testimony before the grand jury, in violation of their
99 oaths of secrecy. I think Your Honor agrees that all of the testimony presented to the grand jury is presented by both the witnesses, the counsel for the Government and the grand jury being under an oath of secrecy.

The Court: The rule doesn't prohibit them—

Mr. Menin: I understand what the rule is and I am going to get to the rule.

The Court: Just a minute, Mr. Menin. Don't interrupt the Court when I speak to you. Rule 6 is the one you rely upon.

Mr. Menin: Now, Rule 6—

The Court: Excuse me a minute and let me say something. Rule 6(e) says: "A juror, attorney, interpretor, or stenographer may disclose matters occurring before the grand jury only when so directed by the Court preliminarily to or in connection with a judicial proceeding, or when permitted by the Court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

So that answers your point there. Now, what is your next point?

Mr. Menin: Now, we find in the record no order authorizing—

The Court: I have decided that. Now, what is the next point you want to make?

Mr. Menin: I understood we were to have a full and complete hearing.

100 The Court: You are, but the Court has heard you and has decided against you on that particular question. Now, what is next?

Mr. Menin: We take it that the Constitution of the United States protects the defendant, the witness here, in his political views and that he has a right to speak them out or remain silent regarding same, as is provided by the first Amendment to the Constitution.

The Court: What political views has he been asked about?

Mr. Menin: All of these questions are regarding his activities in the Communist Party, who he knows in the Communist Party, how many cells there are in the Communist Party—all of the questions that have been propounded all the way through to this witness are all in connection with his activities and his knowledge of the Communist Party. Now, we contend that under the first Amendment a person has the right—it isn't only his right, but it is his inalienable right—to entertain any political views or any religious views that he may desire, that may appeal to him as to be a proper view. Now, that right also carries with it not only the right to entertain those views, but to publish those views and, if he so desires, to remain silent on those views. The Constitution very specifically—

101 The Court: Have you any authority on that?

Mr. Menin: Yes, there is considerable authority on that.

The Court: You mean a man cannot be asked whether he is a Republican or a Democrat or a Progressive or a Communist?

Mr. Menin: Precisely that. If he doesn't desire to disclose his political views, he cannot be asked regarding them.

The Court: What court has held that?

Mr. Menin: Just a second.

Now, if the Court please, in view of the ruling that Your Honor made this morning, I have not come prepared to face this situation. I have here Mr. William B. Murrish of the Los Angeles bar, whom I would like to introduce to the Court at this time for the purpose of presenting an argument on that issue.

The Court: All right, let me hear him. How much time do you want?

Mr. Murrish: Well, Your Honor, I hadn't anticipated speaking on this subject. I was hopeful—I was interested in the case through the Civil Rights Congress because of the grave consequences upon civil liberties particularly in view of the proceedings that took place this morning, and it was originally my hope that we could ask for a continuance so that the matters of such import could be fully and carefully presented. However, if the Court's wish is to permit me to speak now, I would say that perhaps fifteen to twenty minutes would do, Your Honor.

102 The Court: You may have fifteen minutes. Proceed. Confine yourself to the questions before the Court.

Mr. Murrish: I will, Your Honor.

Your Honor, in essence, as I view the proceedings this morning, the major issue that was decided was the propriety of the defendant invoking self-crimination as a justification for refusing to answer questions stated in the presentment. It is my belief that the question raised under Paragraph 3 of the answer, relating to freedom of speech, while it is raised generally there, is of equally, if not greater significance in the case, and was not properly appreciated at the time Your Honor originally acted this morning. However, I would like the privilege of showing why I believe freedom of speech is actually and directly involved. It was first raised by Mr. Menin by his assertion just a moment ago that the right to

free speech includes the right to silence, and Your Honor asked him the question, "Could an individual standing on the right of free speech refuse to answer whether he was a Republican, a Democrat, a Roman Catholic, or, I suppose, any other association?"

That matter has been determined, as Mr. Menin rightfully commented. Your Honor asked if he had authority. I happen to have such authority, Your Honor. Your Honor,
103 I have three cases. The first is Wallace against Georgia-Caroline Railway Company, a Georgia case, 22 Southeastern 579; the second case is Atchison, Topeka and Santa Fe Railway Company vs. Brown, 102 Pacific 459. It is a Kansas case.

The third case, Your Honor, is St. Louis Southwestern Railway Company vs. Griffin, a Texas case, in 171 Southwestern 703.

Briefly, all three of those cases stand for the proposition that a legislature may not, consistent with the Constitution, require an employer to divulge the grounds upon which a given individual was discharged, and they rest upon such language as this which I take from the Atchison, Topeka vs. Brown case, saying this:

"Again, is not the freedom to remain silent, to neither write nor publish anything on a certain subject involved as an element in the guaranteed right to 'freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right'? It would seem that the liberty to remain silent is correlative to the freedom to speak. If one must speak, he cannot be said to freely speak."

That concept, Your Honor, was endorsed, in my opinion, by West Virginia against Barnette in 87 Lawyers' Edition 1628, the familiar case holding that the compulsory flag salute violates the freedom of religion and speech.

The Court: The what?

104 Mr. Murrish: The compulsory flag salute case, Your Honor—salute to the flag, by children. However, I would show you a second manner in which freedom of speech is directly involved in this case, or the right to

remain silent as such, that I would introduce to Your Honor by the right related to free speech—the right of freedom of association, or what I might broaden to label the right of organization, which I think I can show Your Honor is and has been recognized as indispensable freedom of speech once the concept behind free speech itself is fully appreciated.

Free speech has been recognized by our United States Supreme Court as the most important and indispensable rigth in our Democracy, and it is easy, upon analysis, to appreciate why. If the people cannot hear and debate the issues on both sides of matters of policy, then when they make a choice through their elective procedure they do not make a meaningful choice, they do not make a controlling choice; the persons who control their source of information can control their choice. From this indispensable relation between the right to discussion and the right to choice, or the right to elect, we arrive at the conclusion, for example, in Murdock against Pennsylvania, Schneider vs. Irvington, Thornhill against Alabama, all saying that free speech and its correlative rights, the right of association, the right to freedom of religion, the right to freedom of press, sometimes called the right to freedom of thought, basically all centering around the right to free discussion and debate—that those rights stand in a position superior to and far more protected than any other right in our Constitution, the concept being that you can't change other rights. You can't change, for example, the right against self-incrimination or you would alter indistructively the premise upon which democratic government is based. Once you alter the right to freely discuss, the right of men to speak out their minds even though, as Justice Holmes pointed out, their ideas may be hateful to those in the majority, or may be new and disliked—if you stop that primary right to discussion, then you take away from the people their right to govern their own land.

The Court: Can I interrupt you a minute?

Mr. Murrish: Yes.

The Court: Suppose I grant all you say, how does it apply to the facts in this case?

Mr. Murrish: Will you grant it so far as you don't want any more discussion on those premises?

The Court: I say, suppose I grant all you say, how does it apply to the facts in this case?

Mr. Murrish: I would say that from that premise Your Honor would recognize that freedom of speech must exist in substance and not merely in form.

There are many such statements. For example, it is recognized in the American Press case that a tax on
106 newspapers, which, upon its face and in form is perfectly unobjectionable, is stricken down by the Constitution because in substance it affects the right to freely discuss.

Originally the Constitution was adopted by a country of very different economic and social organization than we have today. I believe it was a time of hand newspaper presses it was a time when speech was essentially one of a natural right, speaking with your own voice or with small mediums of communication, like a hand press. Today, as a matter of economic reality, the means of communication are necessarily concentrated industrially and are expensive. This fact is recognized and the significance is noted by Justice Frankfurter in his concurring opinion in Pennekamp against Florida. It is also recognized by Justice Jackson in his comment on the briefs filed in Craig vs. Harney. Both of those observations noted that since free speech is a matter of substance, and since industrialization and the changes in our social organization have made the means of speech expensive, we must now consider the rights of speech in this new world that we live in and we must find that in substance now things which might not have been originally appreciated have become a part of freedom of speech.

I think the most dramatic illustration of that is the recognition of the right of picketing as a right of free
speech. I believe that stems from the original case
107 of Thornhill against Alabama.

Applying it to the instant case, I would say that this shows one fundamental trend, that when the concentration

of the instruments of communication was effected, when the concentration of newspapers was in the hands of far fewer than the total population—the same of radio, of magazines —that the right of ordinary people who do not possess newspapers or radio stations to associate together so that their organized strength and group strength and also their group financial strength can enable them to speak effectively has given the right of association a comparable protection to the right to speech. It is simply stated, without the right to associate freely, whether it be in a trade union or farm cooperative or a political party, without the right to form and join organizations with others, say the lower income groups, they cannot speak effectively, they cannot speak to their fellow people or to their comrades.

The Court: Excuse me. You don't have the point here. How does all that apply to the facts in this case? How has this defendant been denied any of those rights?

Mr. Murrish: Because, Your Honor, one slight intermediate step: The right of free speech originally is not a right—it is a duty, or at least it is also a duty. If all of our citizens resigned their rights to free speech the democratic society would be destroyed, not just an individual
108 being injured; or if one minority view is suppressed, the loss is to society which doesn't hear that view, not to the individual. He simply suffers, let us say, the personal regret of not being able to indulge himself in talking when he wants to.

But this is frequently recognized by the United States Supreme Court, that this right is of importance to society, not to the individual, and it is a duty, not merely a privilege or right.

Now, if the right of free speech is a duty and if essential to that right of ordinary people is the right to freely organize in associations, in groups, so that they may collectively use the right effectively, then does it not follow that they have the right to protect their organization, that they have the right to resist any method of state action, whether it be a tax, a license, statute, or an investigation as the current device has been developed, which infringes on the

right to organize just as fully as they would if that method of state action, investigation, were directed directly at the right to free speech, because the one and the other have now become intertwined, and I would remind Your Honor that the right of free speech assumes or extends not just to direct liberties, but to any method of operation however indirect, however remote the consequences may be.

109 In the Jones case it was held that a direct tax, no matter how small, a license tax, saying that no one can peddle from door to door, if that is applied to a person who is carrying religious or political literature, no matter that they apply it perfectly equally or that they didn't apply it to every other kind of distributor, the fact that it burdens free speech renders that tax null and void even thought it was not the intent, it is the effect, it is the burden that causes the injury to the public, injures society, not the itinerant peddler, and so here if an inquiry may be undertaken such as is described in this presentment whereby with the sweeping questions asked—

The Court: What was the question you object to that the grand jury asked?

Mr. Murrish: I would object to the questions, as I understand them, in their entirety. They ask for membership lists, for members, for names; they want to reveal the potentiality of economic, political, and even criminal intimidation, the members of a lawful political organization. Now, if the membership of an organization can be intimidated by the threat of retaliation such as that, then organization in a real sense is bound to die, and if the organization dies and my premises is right, then the speech of those people has died too.

The Court: This man isn't being prosecuted here for anything he has ever said or done; it is simply that he
110 won't answer questions propounded to him on a perfectly innocent matter and a matter that isn't a violation of the law.

Mr. Murrish: But the question asked him, Your Honor, would have required him to divulge names.

The Court: Name a question that was asked him which you think is wrong.

Mr. Murrish: Well, Your Honor, I am reading from page 2 of the presentment. The lines aren't numbered, but it is paragraph 2 at the bottom of the page. It says he should be prepared "to answer the said specific questions."

I take it these are typical: "2. Who are the officers of each particular club, cell, or subdivision of the Communist Party of Colorado? State their names and addresses.

"3. State the names and addresses of all members of each particular club, cell or subdivision of the Communist Party of Colorado."

Now, Your Honor, if this man were compelled to answer this question it would hold up to intimidation, to potential economic, political, and even criminal prosecution all of these individuals.

The Court: What is there in the criminal code that would be violated by his answering that question?

Mr. Murrish: Well, Your Honor, the indictments under, I believe it is, the Smith Act, isn't it?

111 The Court: You mean in New York, the cases in New York?

Mr. Murrish: Yes, the cases in New York. I think there are two indictments in New York.

The Court: Those haven't been finally decided yet by any court.

Mr. Murrish: That is true, but it places these people—after all, criminal prosecution can be intimidation without being carried to the point of conviction. Why do we have the right to speedy and public trial? Because a trial itself is a penalty, and to expose the members of an organization—not only that, but it is economic intimidation, discharge from their jobs—in a realistic sense the intimidation called for by that question is great.

The Court: I think that's rather far fetched. There is no law by which this man could be prosecuted for answering those questions. It isn't an admission of a violation of any laws of the United States.

Mr. Murrish: Does Your Honor mean to say that only by criminal punishment may speech be penalized and that no other form of state action violates the constitutional guarantees?

The Court: I am not here to answer your questions. If you want me to answer it I'd say I don't go that far, no, but it has to be direct; it can't be indirect.

Mr. Murrish: Would Your Honor permit me to cite to you a Supreme Court case saying that it may be in-
112 direct in point but that if it burdens free speech, it matters not how it was devised, it matters not that it was not done before, as you look at it—if the tax in Murdock against Pennsylvania was only about a five-dollar license tax—that's what it was, but they say these people who go door to door don't have loss of money; it may discourage some and it may discourage all. That's enough. The possibility of discouragement is sufficient demonstration, so that this testimony may not stand on its face without an opportunity of going into the facts of whether it would or would not.

The Court: That's the licensing tax?

Mr. Murrish: Right, Your Honor.

The Court: Those cases were decided on another point.

I have listened to your argument and your time has expired. I don't think you have made any points that I am interested in or which changed my opinion.

Have you anything else to offer, Mr. Menin?

Mr. Menin: We would like, of course, to establish the facts that relate to these very points by the evidence here.

The Court: What do you want to offer?

Mr. Menin: Well, we want to offer evidence of the indictment, the reasons why this man has reasonable grounds to

be apprehensive about this matter. Those are all things which certainly are within his right.

113 The Court: I just offered him that privilege and you said he refused to take advantage of my offer.

Mr. Menin: We have asked to have a full and complete hearing.

The Court: Do you want to put him on the witness stand?

Mr. Menin: It is up to the prosecution to prove their case. Now, when they present their evidence then we will meet it in the proper manner. They haven't presented anything yet.

The Court: Just a minute. Do you want to put Mr. Bary on the witness stand and put him under oath? If so, I'll listen to anything he testifies to. Of course, he'll be subject to cross-examination.

Mr. Menin: Well, are we here to defend ourselves or are they here to present a case against us first before we are required to put up a defense?

The Court: I'm not here to answer your questions; that isn't my place.

Mr. Menin: We have nothing to answer until the prosecution presents their case on what he has done.

The Court: Well, they have.

Mr. Menin: They hayen't shown by this presentment—

The Court: Mr. Bary hasn't answered these questions and you say now he refuses to answer them any
114 further, so that establishes the case unless he wants to go on the stand and explain his refusals.

Mr. Menin: Just a second.

Now, if the Government will let us know what question they want answered we will then inform the Court as to the reasons why they are not answered or why he can't answer them.

The Court: The best way to get that is to put Mr. Bary on the witness stand and let the questions be propounded to him.

Mr. Menin: Do we have to make out the Government's case in this matter?

The Court: That isn't the question, Mr. Menin. Do you want to put him on the witness stand?

Mr. Menin: If they want to call him as a witness.

The Court: What?

Mr. Menin: If they think they have a right to call him as a witness.

The Court: No; I'm just giving him an opportunity to state why he doesn't care to answer any questions propounded to him by the grand jury.

Mr. Menin: As I understand the law, Your Honor, in any proceeding—

The Court I'm not interested in that, Mr. Menin.

Mr. Menin: Well, now, are we required to put this man on the witness stand and make out a case for the
115 Government, or is the Government required to make out the case first? Now, if they will state what questions this man has not answered, then we will inform the Court as to the reasons for that.

The Court: The best way to get at that is to put him on the stand and ask him the questions.

Mr. Menin: Why should he make out the Government's case?

The Court: I am not asking you to, Mr. Menin.

Mr. Menin: Very well; let them proceed.

Mr. Goldschein: May it please Your Honor, this is the question that Mr. Bary refused to answer before the grand jury.

Mr. Menin: Where are you reading?

Mr. Goldschein: That is the question asked and the

answer given, beginning the second question on page 175 from Exhibit G-1. I will read the question and the colloquy that ensued and see if we can get Mr. Bary to answer the question now.

"Question: Now, Mr. Bary, how long have you been chairman of the Communist Party of Colorado?"

Mr. Menin: Where is that?

Mr. Goldschein: Second question from the bottom on page 175 of Exhibit G-1.

116 "Answer: I think for the past two to three years; I don't recall exactly."

The Court: Now, wait a minute. Mr. Menin, does he care to answer the question or not?

Mr. Menin: He has answered it.

The Court: Mr. Menin, he has answered the question and the record shows he has answered that question.

The Court: All right.

Mr. Goldschein: Then followed the colloquy.

The Court: Get down to the particular question he didn't answer that you thing he ought to.

Mr. Goldschein: "Question: Were you a member of the Communist Party of Colorado prior to that time?"

That is the first question on page 176.

"Answer: I will—I decline to answer that on the grounds that it might tend to incriminate me."

The Court: Now, Mr. Menin, does he care to answer that question?

Mr. Menin: We are willing to explain to the Court why he refuses to answer the question.

The Court: What is the reason?

117 Mr. Menin: Well, we will put him on the stand and have him testify to it.

The Court: Take the stand, Mr. Bary.

ARTHUR BARY, called as a witness herein, being first duly sworn, testied as follows:

A. In relation to that question and in relation to most of the questions that—or, all of the questions that I refused to answer, I did it on the basis that—

The Court: I'm not interested in your reasons. Will you state whether you will answer that question or not first?

The Witness: No, sir, I just decline to answer that question.

Q. (By the Court) What?—A. I have refused to answer that question.

Q. You still persist in that refusal?—A. Yes.

Q. All right.—A. I thought I was here to explain why, sir.

Q. Just a minute. Explain why, briefly.—A. Well, I believe that that might tend to incriminate me, and I do not know for what reason that question was asked of me
118 and I don't know what took place a number of years ago, in what connection that was being asked; and secondly I believe that it is an inquiry into my political opinions that I had two or three years ago and I do not believe that it is the province of anybody to question my political beliefs.

The Court: All right, now what next do you want, Mr. Goldschein?

Mr. Goldschein: "Who was your predecessor as chairman of the Communist Party of Colorado?"

The Court: Where is that?

Mr. Goldschein: That is on page 178, the third question from the top of the page.

Q. (By the Court) Do you care to answer that question, Mr. Bary?—A. I decline, and I would like to explain why.

Q. All right.—A. I declined, that I did not want to link myself up in association with another person, not knowing what that person may or may not have done, and for that reason I invoke my privilege of refusing to answer that question.

Mr. Menin: If the Court please, it seems to me that in addition to the questions, that the witness should have been informed as to what purpose these questions had and what object the Government seeks. Nowhere in this presentment, nowhere in any of the testimony, does the Government make clear to these witnesses before the grand jury as to what the object of the inquiry is, and certainly if it is the pur-
119 pose of the Government to go out on a "fishing expedition" in the hope that maybe perhaps they might discover some sort of crime, it seems to me that that is not within the province of the grand jury, it is not within the province and right of the prosecution or the Government attorneys in this case. They have asked questions which may have a tendency to convict, on indictments that were returned; it may have a tendency to incriminate this man, and he refuses to answer those questions.

Now, if they come down—

The Court: What crime could he be charged with?

Mr. Menin: The law doesn't say he has to be charged with a crime.

The Court: I am asking you a question. Will you answer that question?

Mr. Menin: Yes. The crime of conspiracy in associating with other people, in view of the indictment for conspiracy which was returned in New York on the very same sort of a situation.

The Court: All right.

Mr. Goldschein: Now, may it please Your Honor, the presentment specifically advises the defendant what the grand jury was investigating, in the second paragraph.

The Court: Please proceed with the questions.

120 Mr. Menin: He didn't have the presentment.

The Court: Just a minute, Mr. Menin. Please be seated, will you?

Mr. Goldschein: I am sorry; I thought Your Honor wanted an explanation.

The Court: No. Proceed with the questions.

Mr. Goldschein: "What other officers of the Communist Party of Colorado are there at the present time?"

The Court: Where is that?

Mr. Goldschein: Page 179, the second question.

Q. (By the Court) Do you care to answer that?—A. I decline to answer that for the same reason I declined the others, and I would like to explain, Your Honor, that my experience in the grand jury was always that one question led to another question and that it became a process of my feeling, especially after having seen other people committed to jail and this testimony being made public, where individuals were named in the press and where certain dire circumstances resulted to these individuals, some of them losing their jobs as a result of association, and I felt therefore that I should invoke my privilege on that, not knowing why I was being asked these questions.

The Court: All right.

A. And I would like Your Honor to know that I did not know why these questions were being asked. I was never told why.

121 The Court: All right, go ahead.

Mr. Goldschein: "All right. Now, Mr. Bary, how many clubs, cells, or subdivisions of the Communist Party of Colorado are there in existence at the present time?"

That's on 180, the second question from the bottom of the page.

A. I refused to answer that question then and decline now on the grounds that my association with activities or the existence of such clubs might tend to incriminate me; and secondly, that this was an inquiry into my political activities and into my political work.

The Court: You understand the Court, Mr. Bary, has told you that it was no crime to belong to the Communist Party.—A. I understand that the Court has said so, Your

Honor, but I know that people have been fired because they are Communists.

The Court: That doesn't make any difference. Go ahead.

Mr. Goldschein: On page 181, the second question from the bottom of the page: "Whereupon the question was read as follows: How many clubs, cells, or subdivisions of the Communist Party of Colorado are there in existence at the present time?—Answer: I decline to answer that question on the ground it might tend to incriminate me."

122 Q. (By the Court) What do you say to that, Mr. Bary?—A. I have refused to answer that question for the same reasons and because I have knowledge of the fact that there is a case now pending against the leaders of the Communist Party for organizing the Communist Party, for conspiracy, and also on the indictments on the violation of the Smith Act.

The Court: I think if you read the indictment in that case in New York you will find it is entirely different.

Go ahead.

Mr. Goldschein: The last question on page 181:

"Question: Very well. The second question; who are the officers of each particular club, cell, or subdivision of the Communist Party of Colorado at the present time?—Answer: Same answer.

"Question: You refuse to answer?—Answer: Yes, sir."

Q. (By the Court) What do you say to that?—A. I gave the same answer to that in that I was being asked to submit and place myself in association with people and to submit a list of names, not knowing why this question was asked of me; that I might tend to incriminate myself, and I believe that it was also a violation of my right to political association, my right to political activity.

123 Mr. Goldschein: The next question on page 182:

"Question: State the names and addresses of each of the officers of each particular club, cell, or subdivision of the Communist Party of Colorado.—Answer: I decline to answer on the ground it might tend to incriminate me."

Q. (By the Court) What do you say to that?—A. To all of these answers I just want to add in addition, I consider it a violation of my right to my political beliefs and political activities.

The Court: All right.

Mr. Goldschein: The next question:

"Question: Very well. The third question: State the names, and addresses, of all members of each particular club, cell, or subdivision of the Communist Party in Colorado.—Answer: I decline to answer that question on the grounds it might tend to incriminate me."

A. That is the same question, Your Honor.

Q. (By the Court) Same answer?—A. The same questions deserve the same answers.

The Court: All right, go ahead.

Mr. Goldschein: Page 183, the second question from the bottom of the page:

124 "Question: The Denver section? Who appointed Mr. Paul Kleinbord to that position?—Answer: I decline to answer that on the grounds it might tend to incriminate me."

A. That is still my answer, sir, and it is because I do not know what crimes Mr. Kleinbord might be guilty of or what my association with him would mean.

Mr. Goldschein: The last question on that page:

"Question: Did you appoint Mr. Paul Kleinbord to that position?—Answer: Same answer."

A. Same answer.

The Court: Is it necessary to go through the whole record?

Mr. Goldschein: Sir?

The Court: Do you want to pursue this any further?

Mr. Goldschein: Yes, sir. There are not very many more questions. Maybe he will answer some of them.

Page 184, the second question—or, the first question:

"Question: Did a state committee or a state board appoint Mr. Kleinbord to that position?—A. I decline to answer that question for the same reason as the above."

125 The Court: Do you care to change your answer to that question or add to it?—A. No, sir. I would like to state the basis of why I have refused to answer those questions that deal with the organization of the Communist Party, and I am quoting from the indictment that was handed down in the District Court of the United States for the Southern District of New York, on the conspiracy indictment wherein it states:

"The Grand Jury charges—" And I quote from it, after naming the leaders of the Communist Party, that they "unlawfully, wilfully and knowingly, did conspire with each other, and with divers other persons to the grand jurors unknown, to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence, which said acts are prohibited by Section 2 of the Act of June 28, 1940 (Section 10, Title XVIII, the United States Code), commonly known as the Smith Act."

And, although I do not believe this, the fact that there is a grand jury indictment, that such a trial has taken place, led me, on the basis of my understanding and in order to protect myself, to refuse to answer such questions which would lay me open to such charges.

126 The Court: All right.

Mr. Goldschein: I would like to comment on that, if the Court please. The witness this morning stated that he took an oath when he became chairman of the Communist Party of Colorado to defend the Constitution.

The Court: We're not interested in that. Do you have any more questions? Let's finish these questions.

The Witness: I'm defending it here.

Mr. Goldschein: Page 185, the third question from the top of the page:

"Question: Did Mr. Kleinbord, as membership director, act under your direction as chairman of the Communist Party of Colorado?—Answer: I decline to answer that question on the grounds it might tend to incriminate me."

A. Same answer, Your Honor, for the same reasons.

The Court: What is the next question?

"Question (By Mr. Goldschein) Who appointed Mr. Kleinbord to the position of membership director of the Communist Party of Colorado?—Answer: Same reason.

"Question: You decline to answer?—Answer: Yes, sir."

127 A. Same answer, same reason. I would like the Court to know that I do not know why these questions were being asked of me.

"Question: Will you state to this grand jury whether there is such a body as the Executive Committee of the Communist Party of Colorado?"

Mr. Menin: Where is that?

Mr. Goldschein: Page 186, first question.

"Answer: I decline to answer that for the same reason."

A. That is the same answer as asking whether there is a State Committee. Same answer.

The Court: All right. Is that all?

Mr. Goldschein: No, sir, just a few more.

The last question on page 193.

The Court: All right, go ahead.

Mr. Goldschein: The first few words are not part of the question: "Yes, most certainly you can." The question reads:

"The grand jury would like to know from you the names of the officers of the State organization, of the Communist Party in Colorado. This body would like to know from you the names of the officers of each of the branches, subdivisions, or

cells of the Communist Party of Colorado. You have
128 refused to answer those questions. Do you again so refuse?—Answer: I have stated the reason that I have refused is on the grounds that it might tend to incriminate me, and I have tried to explain to you and to the grand jury why this is so."

Next question:

"Question: Mr. Bary, now will you please explain to the grand jury the structural organization of the Communist Party of Colorado?"

Mr. Menin: Where is that?

Mr. Goldschein: Next question.

Mr. Menin: What page?

Mr. Goldschein: 194.

"Answer: It is organized on a local basis, with branches and clubs who carry on their particular activities, and all of these branches are—that is the basic form of organization. Now, what else do you wish to know?

"Question: How many branches are there in Colorado?—Answer: I have stated the reasons why I decline to answer that, on the grounds that it might tend to incriminate me."

The Court: Do you care to answer that, Mr. Bary?—A. That question was asked before, Your Honor, and I answered it.

129 The Court: All right.

Q. (By Mr. Goldschein) Will you give us the name of the Denver cells or branches of the *Communits* Party?—Answer: I have answered that question before, and the same answer prevails now."

A. The same question was asked before and is being asked again.

Q. Same answer?—A. Same answer.

Q. 195, the last question: "As a part of your duties, are you charged with the responsibility for sending a certain amount of the dues collected from local members of the Communist Party of Colorado to the National organization?—Answer: Well, I suppose that the National office expects me

to see that money is sent in, but I do not do that particular piece of work.

"Question: Who does that?—Answer: I decline to answer that question on the ground it might tend to incriminate me."

A. Same answer.

Q. 197, the first question: "Do you know, can you name for us, any members of the Communist Party of Colorado who actually collect the dues from the members of the Communist Party of Colorado?—Answer I decline to answer that for the same reason as above."

A. Same answer.

130 The Court: How many more of these do you have? These are just typical, aren't they?

Mr. Goldschein: Yes, sir, they are typical.

The Court: That's all that is necessary.

The Witness: He asked me about individuals, too, sir.

"Question (By Mr. Goldschein) Now, just a minute. Will you state to this grand jury whether or not these are the names by which the branches of the Denver section of the Communist Party of Colorado are known: Westside branch, Jewish branch, Packinghouse branch, South Side branch, Mexican branch, Youth branch?—Answer: Are you through?

"Question: Yes.—Answer: I decline to answer that on the ground that it will tend to incriminate me."

A. Same answer.

Q. Now, the next question on 198: "Will you state to this grand jury the name of any individual known to

131 you to be a member of any of the branches of the Denver section of the Communist Party who can furnish information to the grand jury as to who is now collecting dues from members of the various branches of the Denver section?—Answer: I decline to answer that question on the grounds that it will tend to incriminate me."

A. I want to add to that an additional reason: I decline now, Your Honor, to answer that question because I believe that that is an invasion of the political function of a political party and constitutes a violation of political activity, right to political activity.

"Question: Do you know a man by the name of James Fowler who resides at 2555 West Thirty-Seventh Avenue in Denver, Colorado, Mr. Bary?—Answer: I decline to answer that question on the same grounds."

Mr. Menin: Now, if the Court please, when it gets down to naming people—as a matter of fact, these people are not Government employes; the presentment indicates that they were seeking to find out whether certain employes might have made false statements in their loyalty oaths. I think it is utterly unfair to continue to make public names of people who have suffered persecution as a result of these names already appearing in the paper, and I submit that
132 these questions may be asked this witness in such a manner that the names of persons wouldn't have to be disclosed. There is no basis for picking on certain people. You could just aswell have used my name or someone else's name and created an implication, which was done throughout the city, that this particular person was a member of the Communist Party. Suppose he had said, "Do you know whether Sam Menin is a member of the Communist Party?" The fact that Sam Menin is not wouldn't make any difference, but the fact that that question got out in the newspapers certainly would have an effect upon the population of the City of Denver, and it has had that particular effect and it has embarrassed these people and in one instance it has broken up a family.

The Court: Mr. Bary doesn't want these questions repeated here, then?

Mr. Menin: I think there should be a little discretion in how these people's names are made public.

The Court: All we can do is ask them as they were propounded, but if you object to it we won't go any further.

Mr. Goldschein: I have no purpose, and I have no discretion, of course, in what questions I will ask. However, if Mr. Men... will stipulate as to what his client's answer will be, and his client will state for the purpose of the record only what the answers are, that these were the answers, the questions asked and answers given, that's all. I'm not interested in injuring any innocent parties, of course.

133 Mr. Menin: If the Court please, for the purpose of preventing these people from suffering further prosecution and persecution, I would suggest that the answer to the following question and the question following that—the four questions following, which name people—if Mr. Bary would look at this record and say that he would answer the same way—

The Court: All right, we will assume he would answer the same way he did before.

Mr. Goldschein: Now, I would like to make an explanation to the Court so the Court will understand our position in this.

The Court: I'm not interested in that.

Mr. Menin: As to the next four questions, they have already named James Fowler. Now, there are four people named that have been persecuted by reason of being named, and I would say to the Court that I have just consulted with Mr. Bary and he indicates that his answers as to the persons named would be the same.

The Court: All right; the record may so show.

Mr. Goldschein: On the top of page 199: "To shorten the inquiry here, Mr. Bary, will you state whether you are prepared to answer to the grand jury whether you have attended any meetings of the Communist Party of Colorado in the year 1948?—Answer: What's that?

134 "Question: Read the question.

"(Question read.)

"Answer: I decline to answer that on the same grounds, for the same reason."

A. You want my answer? I decline to answer that question on the grounds that it would tend to incriminate me; and secondly, on the grounds that an investigation as to what meetings I have attended of a political nature, dealing with or reflecting my political views and political activities, are an invasion of my constitutional right to think politically and to act politically as I wish.

The Court: All right, that ends it.

Q. (By Mr. Goldschein) "The same question, only in the year 1947. What is your answer to that?—Answer: The same."

A. Same answer, same question.

The Court: All right, that's all, then, isn't it?

Mr. Goldschein: Now, I would like to make part of this hearing the transcript of the court proceedings for September 21st, September 22d, September 23d, September 24th, duly authenticated by the court reporter of this court, for either party to use as they may see proper.

135 Mr. Menin: To which we object for the reason that the testimony of the 21st, 22d, and 23d—I'm not sure about the 23d, but I know that the 21st and 22d there were no questions propounded to Mr. Bary, he wasn't the party under inquiry. On the 23d, I'm not sure, and I'd like to see that because we have submitted our records for printing.

We object to making a part of this record the testimony of the 22d and 23d for the reason that there is no reference made to Mr. Bary in any of that testimony except at the very end, this question was propounded:

"The Court: Those other matters then will go over until ten o'clock tomorrow morning. What is this man's name?

"Mr. Goldschein: Arthur Bary.

"The Court: Will you be here then, Mr. Bary?

"Mr. Bary: Yes, sir."

That is the only reference in the testimony of the 21st, 22d, and 23d to Mr. Bary, and we've got to buy these records and pay for them and I don't think we should be burdened with the 21st, 22d, and 23d as part of the record if we have to appeal these cases.

The Court: Objection overruled. What's next, gentlemen?

Mr. Menin: Save an exception.

Mr. Goldschein: May I ask Mr. Bary just two or three questions, may it please Your Honor?

The Court: All right; just hurry it up.

136 Q. (By Mr. *Goldsechein*) Mr. Bary, you were in the courtroom on September 21st, were you not, when Jane Rogers and Miss Wertheimer were brought into court with reference to their refusal to answer certain questions before the grand jury?

Mr. Menin: We object to that question on the ground that it is incompetent, irrelevant and immaterial. It doesn't tend to prove or disprove any issue in this proceeding.

The Court: Objection overruled.

Mr. Menin: Save an exception.

A. I don't know what day that was, Mr. Goldschein; I don't know. I was in one day here, but I think they appeared in court three days, and two of those days I was held upstairs in a room.

Q. Yes. On the day when the Court admonished them to return to the grand jury and answer those questions.—A. I don't think I was in court that day. I was in court when they were sentenced. I was held upstairs.

The Court: What difference does it make?—A. I was held upstairs as a witness.

Mr. Goldschein: That's the 23rd. That's all, Mr. Bary.

Q. (By Mr. Menin) Now, Mr. Bary, in refusing to answer these questions, what was your object in taking the action that you did? What I mean is, were you intending to obstruct the business of the grand jury, or did you have any other reason for it?—A. My intention was not to obstruct the business of the grand jury. I went into
137 that grand jury as a witness, basing myself on what I believed to be my constitutional rights, trying to adhere to my understanding of what my constitutional rights were, and I did not know why this inquiry was being made, why these questions were asked of me, what relevance these people had to the questions that were being propounded and the activities these people may have or have not been engaged in, and I therefore, on the basis of that background and that situation, invoked my privilege of refusing to testi-

fy against myself, and so attempted to uphold the first Amendment to the Constitution which states that my political beliefs, my political activity, as I understand it, things that are sacred and inalienable and must not be invaded. I also got the feeling, and I want to state this to the Court, that this was a political persecution, that I was there because I was a Communist.

Mr. Goldschein: We object to that. He has answered the question.

The Court: Go ahead; state what you want.—A. And that had I not been a member of the Communist Party or had I not been associated with Communist activities I would not be subjected to the things that I have been subjected to in the recent period, which were, namely, my entire activity being disrupted, I was pulled back and forth, subjected to all kinds of grilling, testimony made public,
138 which was printed in the press, emblazoned across the press, and where the entire activity of my political party was placed in jeopardy. I think the Court should know that a candidate for the State Legislature is here in court today. I am a member of the Campaign Committee and as a result of this we will be unable to present to the people of Colorado the position of the Communist Party.

The Court: Is that all you care to say, Mr. Bary?

The Witness: That's all; thank you, sir.

The Court: All right, we will close this, then.

The Court is of the same opinion it was this morning when it adjourned at noon, and it has reopened the case at the Court's own instance and there haven't been developed any new facts or questions to change the previous opinion that the Court entertained and expressed, and therefore the sentence imposed this morning is re-imposed, and is the same as it was this morning.

Mr. Menin: May we have an opportunity to ask the Court to fix bail in this matter, pending an appeal?

The Court: The record may show you asked for bail and the Court refused it.

Mr. Menin: We ask the Court, then, to reconsider the matter of bail pending the outcome of proceedings now in the Circuit Court of Appeals and the Supreme Court; that is, could we ask the Court to leave the question open, without prejudice, depending upon the decision that will there be made?

139 The Court: I am informed by Judge Phillips that there is nothing pending before his court at this time in this matter.

Mr. Menin: The motion for bail is pending before Judge Phillips' court, filed this morning based on an order of Judge Wiley Rutledge, who indicated that he would entertain a motion for bail if the motion were first made in the Circuit Court to the Court as a whole. Such motion was presented this morning. It will be argued next week. If it is denied, Judge Rutledge's opinion or order was that it would be without prejudice to filing another motion before him. The only request we make now—

The Court: You haven't any copy of any order made by Judge Rutledge. His mere opinion expressed, of course, is not binding.

Your motion will be denied.

Mr. Menin: May we ask the Court to leave the matter open without prejudice to our right to reopen the case on a request for bail in this court?

The Court: You can come in here and ask for bail at any time. In this instance it is refused, however.

It is the judgment and sentence of the Court that the defendant Bary be committed to the custody of the Marshal and confined until such time as he purges himself of contempt of court, or such further order as may be made.

140 If that's all, court will stand adjourned until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10 o'clock, a. m., October 13, 1948.)

October 13, 1948—10 O'clock a. m.

(In the Chambers of the Court.)

141 The Court: In the cases coming up this morning of Paul Meir Kleinbord, case No. 2550, and Tracy Roy Rogers, 2549, for contempt, the same motions and answers having been filed as were filed in the case of Bary and which were argued at length and discussed in full yesterday in court, and the Court having made rulings on said motions and the answers thereto, it is stipulated that the record made yesterday and the arguments made on these motions and the rulings thereon made shall apply with equal force to the motions filed in respect to the above-named defendants.

(The following proceedings were had in open court.)

The Court: Tracy Roy Rogers; is he here? Will you come forward, Mr. Rogers?

Mr. Rogers, your matter comes up this morning for a question of contempt of court, and the Court is informed that you have three little children that you have to take care of.

Mr. Rogers: That is correct.

The Court: In that event the Court is inclined to let you go on bond if you can give bond of $1000 for your appearance when wanted.

Mr. Goldschein: May the Government be heard before the Court rules on that?

142 The Court All right.

Mr. Goldschein: Your Honor, I would like to take just a few minutes to tell you what the obstruction of this grand jury is so you can see how this man is delaying, holding up, and obstructing this grand jury in its work. Let me point out by way of illustration how he is just playing around in the grand jury room.

One of the questions asked him, page 224, is: "Have you held more than one position in the Denver section of the Communist Party of Colorado?—"Answer: I decline to

answer that question on the ground that it might tend to incriminate me."

Now, right below, on that same page, he is asked: "What position did you hold?" and he answers "Secretary."

Now, "Did you ever serve on any committee in the State organization?—Answer: I decline to answer that on the ground that it might tend to incriminate me."

Another question: "Have you served on any committee for the Denver section of the Communist Party of Colorado?—Answer: I decline to answer that question on the ground that it might tend to incriminate me."

Now, let me show Your Honor the importance of these questions and how this man can help the grand jury merely by going in the grand jury room and answering those questions.

143 The Court: I assume that he can answer them, help the grand jury, or else you wouldn't have him up here.

Mr. Goldschein: Then the question of his children is, with him, secondary.

The Court: Not with the Court, under the circumstances.

Mr. Goldschein: May it please Your Honor, if this man is in defiance of the grand jury and this Court, he is not a proper person to have the custody of these children and they are better off in the hands of some society of the State rather than his.

The Court: That isn't a proper remark, Mr. Goldschein.

Mr. Goldschein: I'm sorry, sir.

The Court: The Court will admit him to bail for a thousand dollars. Can you give a thousand dollars bond, Mr. Rogers?

Mr. Menin: I think it can be arranged this afternoon.

The Court: All right, he will be committed to the custody of the Marshal.

Mr. Menin: May I ask the Court to release him to my custody until this afternoon, and I will have him up here with the bond?

The Court: Will you be here this afternoon, Mr. Rogers?

Mr. Rogers: I will, sir.

The Court: All right; that disposes of Rogers.

Mr. Menin: As I understand it, then, there is no hearing on this proposition today, on Mr. Rogers?

144 The Court: The Court is doing this, Mr. Rogers, out of consideration for your family, so please understand that you cannot be excused for your alleged contempt of court. As for your children, you can't hide behind them. So please bear that in mind with respect to your future conduct in court.

Mr. Rogers: I have no desire to hide behind my children, Your Honor.

The Court: All right.

The Clerk: The motion for continuance is granted?

The Court: Yes.

Mr. Nevans: I would like to point out to the Court in that motion for continuance his family situation is not mentioned. The grounds for his request for continuance are so that he can go out and campaign as a candidate for the State Legislature.

The Court: He has that right, of course.

Mr. Nevans: Yes, sir, but if this family situation were of importance it is strange that it isn't mentioned in the motion for continuance.

The Court: I don't think so. All right, what's next?

Mr. Nevans: The case of 2550, in the Matter of the Witness Paul Meir Kleinbord before the grand jury, if the Court please.

The Court: Is Kleinbord here?

145 Mr. Nevans: Yes, sir.

The Court All right, proceed.

Mr. Nevans: This matter is up before the Court this morning, if Your Honor please, on an order to show cause why Paul Meir Kleinbord, a witness before the grand jury, should not be cited for civil contempt.

We would like to point out to the Court that he was originally called before the grand jury on the 21st of September, 1948; that he answered some questions and refused to answer other questions. He was cited to appear before this Court on the 23d and 24th days of September to show cause why he should not be cited for contempt. At that time the Court did instruct him that he must answer proper questions before the grand jury.

I would like, at the outset, to introduce in evidence certain exhibits, the first of which is the grand jury transcript as respects the testimony of Paul Meir Kleinbord on September 29th, 1948, which we will ask the reporter to mark Government's Exhibit 1.

(Whereupon the transcript referred to was marked Government's Exhibit 1 for identification.)

Mr. Nevans: As stated in court yesterday, this is certified to be an official transcript by the official court reporter of this court. Mr. Menin stated yesterday, I believe, that he has no objection to its being admitted in so far as the certification of the court reporter is concerned.

146 Mr. Menin: I stipulated yesterday, and I stand on that stipulation, that if the court reporter were requested to take the stand and testify as to whether this is his official transcript, we will concede that that would be his testimony so that the reporter would not have to leave his position and someone else take the testimony. As to whether or or not it is admissible is a question for the Court to rule on and we do not stipulate that it is admissible. It is up to the Court to rule on that.

The Court: What is your objection to its admission?

Mr. Menin We object to the admission of all of this

testimony as being the secret testimony of the grand jury and having no place in the public records here. We concede that this reporter, the reporter whose name is on there—

The Court: I understand. I think it is admissible, although I don't think it is necessary to offer it because it is part of the records of the Court, of which we can take notice at any time.

Mr. Nevans: Yes, sir. We wish to have, during the course of this matter, the Court refer to the original of the transcript.

The Court: All right.

Mr. Nevans And we wish it admitted for that purpose.

147 (Whereupon, the transcript referred to was marked Government's Exhibit 2 for identification.)

Mr. Nevans: We would like to move the admission, under the stipulation which Mr. Menin has just agreed to, of the official transcript of the proceedings in open court in connection with the witnesses before the grand jury on September 21st, September 22d, September 23d, and September 24th. The admission of this transcript was argued at some length yesterday and the Government would like to move its admission today in this matter.

Mr. Menin: To which we object for the reasons heretofore given, first, we object to counsel putting words in my mouth as to what I stipulated to. I merely stipulated—

The Court: The record will show what you stipulated to.

Mr. Menin: Yes. I stipulated that the reporter would not have to authenticate this record.

We object further that the transcript of September 21st, September 22d, and September 23d, is entirely irrelevant and immaterial and does not bear on this case and does not mention these parties whatever throughout the entire transcript of that testimony, and it is merely encumbering the record and putting an additional burden upon the

defense here in having to order a lot of testimony which is not part of the record and which we have to pay for.

148 Mr. Nevans: That is a misstatement, if the Court please.

The Court: Just a minute. Objection overruled. Go ahead.

Mr. Nevans: Thank you. Now, if the Court please, prior to going into the particular questions which Paul Meir Kleinbord refused to answer before the grand jury on September 29th, I would like to read from the Government's Exhibit No. 2 parts of four or five pages, if the Court will indulge me, to give the Court an understanding as to what has occurred in connection with this witness.

I am reading from page 41 of the proceedings before this court on September 23d.

The Court: You want the defendant to listen to that?

Mr. Nevans: Yes, sir.

Mr. Menin: On page what?

Mr. Nevans: Page 41 of the proceedings before this Court on September 24th. This is an excerpt of the witness Kleinbord's testimony before the grand jury on September 21st, which was read to the Court on that day.

"Question": to Mr. Kleinbord: "Now, who else handled those cards other than you?—Answer: Of course—are you asking me for individuals, sir?

149 "Question: Yes.—Answer: Well, in that case, sir, I feel that I cannot make statements in this respect because I feel it is incriminatory.

"Question: What is incriminatory?—Answer: To make statements in regard to other individuals. I feel that I want to answer questions here honestly about myself, as I have, questions pertaining directly to myself, but I feel that other questions pertaining to other individuals are incriminatory.

"Question: Well, let me explain the law to you. If I ask you any question that may incriminate you for the violation of any offense against the United States Government, you are then privileged to refuse to answer and base

it on the ground that it may incriminate you. You can't refuse to answer any question that may incriminate someone else. The privilege is personal to you and does not cover anyone else other than you.—Answer: I understand that, sir.

"Question: Now, therefore, you must answer the question pertaining to other people. Now, who else other than you handled those membership forms?—Answer: Well, I just want to say this, that even according to what, the way you explained that law, I feel that personally according to my principles, my political convictions, that that
150 would be incrimination, because that would be incrimination against myself, because my political convictions are such that I feel sitting here I can't, because of the situation, incriminate—that is, name other people."

Now, on page 49 of the same date, speaking of entries in the Communist record:

"Question: Who does make an entry?—Answer: Anyone who made that, who takes the dues from him makes that kind of an entry.

"Question: Now, wait a minute. Anybody would be who? Does everybody collect dues?—Answer: No, specific people.

"Question: Who collects dues now?—Answer: The membership, the directors of the parties collect dues.

"Question: Who is that?—Answer: As I said before, I feel that I can't answer such questions, and I'd like to explain here why.

"Question: Well, will it incriminate you for the violation of a Federal offense?—Answer: I feel that—

"Question: Will it incriminate you for the violation of a Federal offense?—Answer: It incriminates my principles."

151 Continuing on page 50:

"Question: Will it incriminate you? Incriminate means that it will make you responsible for the violation of a Federal statute.—Answer: I don't want to be held responsible in regard—

"Question: You are not held responsible for anything other than a violation.—Answer: Myself.

"Question: —of the Federal law. Have you violated any Federal law?—Answer: I have not, sir."

Then proceed over to page—

The Court: That question, "Have you violated any Federal law," is hardly a proper one.

Mr. Nevans: Only in so far as it is—

The Court: I don't care to argue it. Go ahead. That is just my observation.

Mr. Nevans: Reading on page 95, after this matter was brought before the Court fully, his testimony in this regard, the Court stated, after calling Mr. Kleinbord before the Court:

"Mr. Kleinbord, you are directed to answer those questions. You are instructed that this freedom from self-incrimination applies only to you and not to other people. If you know anything about anybody else and are asked proper questions, you must answer.

152 "Mr. Kleinbord: Yes, sir.

"The Court: All right, that settles that. Will you do that?

"Mr. Kleinbord: Yes, sir. I would like to make a short statement."

And then he makes a statement regarding the condition of his health on that day.

Now proceeding with his testimony on September 29th, 1948, before the grand jury, I would like to hand the Court Government's Exhibit 1 so that this testimony can be followed, and in view of the Court's ruling in chambers this morning the Government would like to call Mr. Paul Meir Kleinbord as a witness and have him sworn at this time.

Mr. Menin: At this time the defense objects for the reason that this party is now a defendant before this Court and the prosecution has no right to call the defendant to testify against himself.

Mr. Nevans: If the Court please, this is a matter of civil contempt. The procedure governing civil contempt

is not that which governs civil actions, normally. This man has been cited to appear before Your Honor this morning because of his obstruction of the grand jury.

153 Now, when we wish him placed on the stand so that he can inform the Court in what manner his answers to particular questions propounded by the grand jury would incriminate him, we meet with the same obstruction with which the grand jury has met for the past two weeks. Mr. Menin's objection is not a proper one. The Court can call this witness, we can call the witness, or Mr. Menin can put him on himself

The Court: I think he has the right to refuse to take the stand if he wants to.

Mr. Menin: Now, just a second.

The Court: Wait a minute. Ask him if he wants to take the stand, Mr. Menin.

Mr. Menin: I would like to get clarified on this legal point.

The Court: There is no legal point there. Just ask him the question.

Mr. Menin: May I make my statement for the purpose of the record?

The Court: You have already made it.

Mr. Menin: I want to make a statement for the purpose of the record.

The Court: Go ahead.

Mr. Menin: All right. Now, counsel keeps referring to this matter as a civil contempt. The mere fact that he calls it a civil contempt doesn't make it a civil contempt.

154 The Court: The Court has ruled on that point.

Mr. Menin: May I finish my remarks, for the purpose of the record? The mere fact that he does that, in my judgment, doesn't make it civil contempt. The fact is they are proceeding under the criminal laws of the United States and are proceeding under the criminal code which makes contempt a crime. Now, we asked for a jury trial yes-

terday and Your Honor overruled it. Now we are saying this to the Court, irrespective of whether the Court thinks we are entitled to a jury trial or not—and we disagree with the Court on that matter—the fact that the defendant now comes into court and is charged with criminal contempt, and he is now asked to take the witness stand so they can prove their case against him, and I submit that under the law there is nothing in the Constitution and there is nothing under any procedure under English jurisprudence which provides that the defendant must take the witness stand and answer questions that the prosecution wants to have him answer so that they can make out a case against him.

The Court: Nobody has told him he must take the witness stand. I have just said the opposite. I offered him an opportunity to take the stand if he cares to. Now I am asking whether he cares to take it or not.

Mr. Menin: We desire to submit to the Court our reasons for refusing to answer questions.

155 The Court: You have already given them, haven't you?

Mr. Menin: Before the grand jury, but we don't intend to have it brought in in that manner, where we are put on the spot and have to prove ourselves innocent as against their charge of guilt.

Mr. Nevans: If the Court please, I don't wish to argue in answer of Mr. Menin's argument which was argued at length yesterday. The Court ruled that we were not proceeding under the criminal statutes, in a matter of criminal contempt. I would like to state, though, that the very nature of this proceeding requires this man, under an order to show cause, to appear before this Court to show the Court why he should not be found guilty of contempt of this Court.

The Court: I know, but we can't *compell* him to take the witness stand if he doesn't care to.

Mr. Nevans: No, sir.

The Court: All right, that ends that.

Mr. Kleinbord, do you care to take the stand?

Mr. Kleinbord: Your Honor, I would like to consult with my counsel.

The Court: All right.

Mr. Menin: If, after the prosecution puts on their case and we feel that they haven't proved their case—

The Court: Just a minute. The Court has ruled he doesn't have to take the stand, and I want him to decide whether he cares to or not. Just make up your mind on that.

156 Mr. Nevans: We would like to point out, for the purpose of the record, that our reason for asking him to take the stand is to explain the privilege he has asserted.

The Court: I know, but he doesn't care to do it, Mr. Nevans, so if he wants to waive that right, all right.

Mr. Menin: If the Court please, before we proceed we should like to know under what theory the Court feels that we are proceeding, whether this is a criminal proceeding or whether this is a civil proceeding.

The Court: The Court held yesterday it was a civil proceeding.

Mr. Menin: In view of the Court's ruling, while we wouldn't agree with it—and we want the record to so show—we feel that the Court's ruling is entirely incorrect in holding that this is a civil proceeding—however, in view of that and in deference to the request of the Court made that this man take the stand to present his answer, we will now, without waiving any right under the Constitution as it pertains to defendants in criminal cases, put the defendant on to explain the situation before the grand jury.

The Court: Take the stand and be sworn.

157 PAUL MEIR KLEINBORD, called as a witness herein, being first duly sworn, testified as follows:

Mr. Nevans: If the Court please, on page 205 of Government's Exhibit 1—

The Court: All right, go ahead.

Mr. Nevans: —at the bottom of the page, and it will be necessary for me to read some prior questions.

The Court: Go ahead, then. Go ahead and read it. Let's get along. Don't make these long explanations.

Mr. Nevans: Yes, sir.

"Question: Now, you stated you were membership director of the Denver section for approximately how long?—Answer: For approximately nine months, I'd say.

"Question: And under whose direction were you working then?—Answer: I'd say the same kind of direction."

The Court: Get down to the questions that he refused to answer. It isn't necessary to read the whole transcript.

Mr. Nevans: Yes, sir.

"Question: Was anyone working under your supervision and direction?—Answer: Well, that, sir, I decline to answer on the grounds that I believe that it would tend to incriminate me."

158 He makes two subsequent refusals to that question on page 206, after being asked if it would incriminate him.

Now, turning to page 208. The Court has indicated that the Court wishes this proceeding shortened as much as possible. I would like to state, however, that after this refusal that the grand jury had read to Mr. Kleinbord the Court's instructions to him in regard to answering questions.

Mr. Menin: Now, if the Court please, I don't think that there is anything in the record in either the proceedings before the grand jury or the proceedings in this court—and that's one of the matters we take up in our answer—wherein the Court ordered this witness to testify as to any questions. The Court merely told the witness to be there and to answer

the questions as best he could, and there wasn't any specific question that was asked by the prosecution here which the Court instructed him to answer, and for that reason we don't think that under this proceeding this man can be held in contempt of this court.

The Court: All right, go ahead.

Mr. Nevans: Page 208:

"Question: You refuse to give the names of any other people who are working under your direction as membership director on the grounds that it will tend to incriminate you: is that correct?—Answer: That's correct.

159 Question: Not on the grounds it would tend to incriminate them, but on the grounds it would tend to incriminate you?—Answer: Myself, that's right. I would like to point out that since I was here last week I have tried to study up on the United States Constitution and the bill of rights."

Mr. Menin: Read the rest of it.

The Court: Read the rest of it.

Mr. Nevans: All right.

"Answer: —and I see here, it states here clearly in Article V that—

"Question: Now, just a minute.—Answer: —that a witness cannot—

"Question: Just a minute, please."

Does the Court wish me to proceed with this?

The Court: Go ahead.

Mr. Nevans: Yes, sir.

"Question: Just a minute, please. This grand jury, I believe, is as familiar with the Constitution of the United States as you are, and this grand jury does not presume to

160 determine whether you shall answer certain questions—that's a matter for the District Court of the United States, Judge Symes. Judge Symes has ruled in that respect and if you are unwilling to comply with his ruling we will have no alternative but to take you before Judge Symes and

have him instruct you again or take whatever action against you he deems necessary. There are, however, other questions that we would like to have you answer."

Proceeding to page 210, the middle of the page:

"Question: *You* appointed you membership director of the Communist Party of Colorado?—Answer: I decline to answer that question on the grounds that it might tend to incriminate me.

"Question: Incriminate you for the violation of a Federal offense, Mr. Kleinbord?—Answer: I believe that the answer to that question would tend to incriminate me.

"Question: For the violation of a Federal offense?—Answer: Yes, sir."

At the bottom of page 210:

"Question: Who appointed you section organizer for the Denver section of the Communist Party of Colorado, Mr. Kleinbord?—Answer: I decline to answer that question on the same grounds, that it may tend to incriminate me.

161 "Question: For the violation of a Federal offense?—Answer: I don't know; it may.

"Question: You are not certain, but you think it might; is that correct?—Answer: That's right.

"Question: How many branches of the Denver section of the Communist Party are there?—Answer: I decline to answer that question on the grounds that it may tend to incriminate me."

At the bottom of page 211:

"Question: Who were the persons that you collected dues from the various branches of the Denver section of the Communist Party of Colorado from?—Answer: I decline to answer that question on the grounds that it may tend to incriminate me.

"Question: Do you know the names of persons from whom you collected dues, in your possession as membership director of the Denver section of the Communist Party of Colorado?—Answer: I decline to answer that question on the same grounds, that it may tend to incriminate me."

Proceeding to page 213, the second question on that page:

162 "Question: Have you ever served on any committees of that organization?" That is referring to the Communist Party of Colorado.—Answer: Oh, I think I have, yes.

The Court: Wait a minute. Read the question.

Mr. Nevans: Yes, sir.

"Question: Have you ever served on any committees of that organization?—Answer: Oh, I think I have, yes.

"Question: Name the committees, please.—Answer: I decline to answer that question on the grounds it may incriminate me."

Proceeding to page 215:

"Question: Will you state to the grand jury the names of those committees?—Answer: I decline to answer that question on the grounds it may tend to incriminate me."

The Court: Wait a minute. You didn't read the entire question, did you?

Mr. Nevans: Yes, sir; on page 215. The Court has asked me to shorten this. It is necessary, to get the full meaning of these questions, to read one or two questions which precede the particular question involved.

The Court: Go ahead.

163 Mr. Nevans: In this particular question it was restricted to the month of August, 1948.

The Court: I don't care for your explanation; just read the questions.

Mr. Nevans: Yes, sir.

"Answer: I decline to answer that question on the grounds it may tend to incriminate me."

The middle of the page:

"Question: That's correct; that is, if you didn't know the answers, of course you couldn't give the answers. I'm going to ask you those questions now, Mr. Kleinbord. The first question: How many clubs, cells, or subdivisions of the Denver section of the Communist Party of Colorado are there

functioning at the present time?—Answer: I decline to answer that question on the grounds that it may tend to incriminate me.

"Question: State the names of each of those clubs, cells, or subdivisions of the Denver section of the Communist Party of Colorado.—Answer: I decline to answer that question on the ground that it may tend to incriminate me.

"Question: Who are the officers of each particular club, cell, branch or subdivision of the Denver section of the
164 Communist Party of Colorado?—Answer: I decline to answer that question on the ground that it may tend to incriminate me.

"Question: State the names and addresses of each of the officers of each of the particular clubs, cells, or subdivisions of the Communist Party of Colorado.—Answer: I decline to answer that question on the ground that it may tend to incriminate me.

"Question: State the names and addresses of all the members of each particular club, cell, or subdivision of the Denver section of the Communist Party of Colorado that you know.—Answer: I decline to answer that question on the ground that it may tend to incriminate me."

Proceeding over to page 217:

"Question: To save the time of the grand jury, Mr. Kleinbord, instead of questioning you at length concerning meetings of the Denver section of the Communist Party of Colorado and of branches of the Denver section of the Communist Party of Colorado, I will ask you on behalf of the grand jury whether you will testify to the grand jury concerning your attendance at such meetings, and who was present at such meetings.—Answer: I decline to answer that question on the grounds that it may tend to incriminate me."

Proceeding over to page 218:

"Question: Who was present at that meeting?—Answer: I decline to answer that question on the grounds that it may tend to incriminate me."

165 At the bottom of page 218:

"Question: No, just a minute. I am speaking of the last meeting of the Communist Party that was held at—"

Mr. Menin: Just a minute. Before we proceed with that, I object to the other part of that question for the reason that it tends to place in the public records certain addresses which are merely matters of inquiry, without proof, and I don't feel that the matter should be made public so as to embarrass people who may live at the address that is indicated here, and I would suggest that if counsel will show this question to the witness and ask him if his answer would be the same regarding this particular address, I think it would be more in the interest of justice and be more in the interest of saving people embarrassment and loss of jobs, as has already occurred.

The Court: Objection overruled. Go ahead.

Mr. Menin: Save an exception.

Mr. Nevans: "No; just a minute. I am speaking of the last meeting of the Communist Party that was held at 2802 Welton Street, Denver, Colorado.—Answer: I decline to answer that question on the grounds that it may tend to incriminate me."

166 Now, if the Court please, those questions are the ones propounded to Mr. Kleinbord September 29th by the grand jury and which he refused to answer. Mr. Kleinbord did, as the Court can see from the transcript, answer all questions concerning himself as distinguished from other people, other members of the Communist Party. Now, the Court has indicated that the Court prefers this procedure, that the Government read all of the questions that he refused to answer and he can be asked at this time to state his grounds, his reasons why the answers to those questions would tend to incriminate him. We suggest also that if he cares to state to the Court privately as distinguished from open court how these questions would tend to incriminate him, the Government certainly has no objection to that.

Mr. Menin: If the Court please, before the question is propounded to Mr. Kleinbord— Are you through?

Mr. Nevans: No.

Mr. Menin: Oh, I am sorry.

Mr. Nevans: Is that the Court's pleasure?

The Court: We will wait and see what Mr. Menin has to say.

Mr. Nevans: Yes, sir. We would like to ask the Court in view, as I said, of the Court's desire to have this matter shortened, that it be stipulated that the Court, or the Government on behalf of the Court, can read all of these ques-
167 tions to the witness at one time; that he be allowed to interrupt at any time, or, rather, answer any question immediately upon its being read, state to the Court the reasons why he feels that it would tend to incriminate him. That can be done, the Government suggests, either in open court or privately in chambers.

Mr. Menin: They have already asked all the questions.

The Court: Mr. Kleinbord, have you heard these questions read?

Mr. *Kelinbord:* Yes.

The Court: And you heard your answers as they were recorded?

Mr. Kleinbord: Yes, sir.

The Court: Are those answers correct?

Mr. Menin: Just a minute.

The Court: Just a minute.

Mr. Menin: Before he answers I would like to be heard.

The Court: What was his answer?

Mr. Menin: I want to make the record clear.

The Court: Just a minute. Wait until the Court finishes. Be quiet. Now, what was the last there?

(Whereupon the reporter read as follows:

"The Court: And you heard your answers as they were recorded?

"Mr. Kleinbord: Yes, sir.

168 "The Court: Are those answers correct?")

The Court: Can you answer that Yes or No?

Mr. Kleinbord: What was the question again?

(Whereupon the reporter read as follows: "Are those answers correct?")

Mr. Kleinbord: Those answers are correct.

The Court: The answers you made according to the record?

Mr. Kleinbord: I believe those are the answers, substantially, that I gave.

The Court: Do you desire now to answer those questions or change your answers in any way?

Mr. Menin: Now, before he answers that question I would like to be heard on this matter.

The Court: Just a minute, please. Let him answer the question.

Mr. Menin: Do we have to put ourselves in the position of answering before we make our argument on the law of the matter?

The Court: The Court asked you to let him answer.

Now, read the question again.

(Whereupon the reporter read as follows: "Do you desire now to answer those questions or change your answers in any way?")

169 Mr. Kleinbord: Do I have the right to consult my attorney at any time I wish?

The Court: Yes, you may consult him now.

(Whereupon a short recess was taken.)

Mr. Kleinbord: Your Honor, I am answering this question under protest because I would like to have my attorney present the legal basis for this, if possible.

The Court: You answer that question, then he can make any statement he cares to. What is the question now?

(Whereupon the reporter read as follows: "Do you de-

sire now to answer those questions or change your answers in any way?")

Mr. Kleinbord: Yes.

The Court: All right, proceed.

Mr. Kleinbord: I would like to state first, Your Honor, that I think the record—

The Court: Mr. Nevans, will you please be seated?

Mr. Nevans: Yes.

Mr. Kleinbord: —that the record shows that I have been far from an unwilling and obstructionist or defiant witness before the grand jury. I have answered the questions. I have answered the questions to the best of my ability, and
170 knowledge, and I take the same position in this court, Your Honor. However, I felt, as an American, that I had to draw the line where questions involved and invaded what I believe, firmly believe, are my constitutional rights as an American and where questions infringed upon the first Amendment of the Constitution, where I have the right to believe and have convictions, political conviction, and believe in certain political ideas, and where it involves the free association in relation to these political convictions I believe that I have the right to therefore claim privilege because it might tend to incriminate me under the Fifth Amendment, such associations particularly where I am aware and the whole court is aware that twelve leaders of my party are indicted, among other charges, on the charge of conspiracy, and certain associations might lay me open to such a charge.

Therefore, in my mind I felt that I could not answer such questions. Under the Fifth Amendment of the Constitution, of the Bill of Rights, no witness can be compelled to testify against himself and I felt, Your Honor, that I was only standing on my rights as an American by refusing to break with this basic law of our land.

The Court: Is that all?

Mr. Kleinbord: That's all, sir.

The Court: Do you care to say anything, Mr. Menin, now?

171 Mr. Menin: Yes, sir. If the Court please, first we have in this situation the presentment of the grand jury where the prosecution or the Government attempts to set up in this presentment that at a certain time certain employes of the Government allegedly made false statements in connection with a loyalty investigation, in violation of Section 80, Title XVIII, U.S.C. This was never communicated to the witnesses at the time they were asked to offer their testimony.

However that may be, there is not a single question in this entire transcript, whether taken before the grand jury or questions which were propounded in open court, which related to whether or not a certain person was an employe of the Government and was a member of the Communist Party or was in any way disloyal.

Now, Your Honor will note that in this presentment it says, "Made false statements in connection with their loyalty investigation in violation of Section 80."

What has that to do with the Communist Party any more than it has to do with the Republican or the Democratic Party or the Socialist Party or any other party? Just because somebody in the Government made a false statement in his affidavit on the loyalty question, these people are all hauled into this court and brought before the grand
172 jury and asked questions regarding their personal lives, regarding their personal beliefs and personal political beliefs, which we think the Government has no right to go into in view of the First Amendment of the Constitution. We think that the First Amendment is as applicable to the Government as it is to the defendants.

Now, in a case which involved precisely the same issue, a court has held—a Court of the United States has held—and I would like to read this case, because it's rather short.

The Court: What case is it?

Mr. Menin: It is the case of the Honorable David Pine, a Judge of the District Court of the United States for the District of Columbia.

Mr. Goldschein: What is the name of the case?

Mr. Menin: What's that?

Mr. Goldschein: The citation?

Mr. Menin: In re Emil Costello, decided June 29, 1947.

Mr. Nevans: Citation?

Mr. Menin: I have no citation on it. I have the memorandum opinion of the Court.

This case had before it precisely the same issue. A man was brought before the grand jury, he was asked regarding his activities in the Communist Party, and here is what the Court says:

"I have before me the question of the constitutional safeguard against self-incrimination. The case that is cited time and again by all the authorities and by the Supreme Court of the United States is the case of United States vs. Aaron Burr, and in that case Chief Justice Marshall has this to say about this provision of the Constitution:

173 "'When a question is propounded (a question which the witness declines to answer upon the ground that it may tend to incriminate him), it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The Court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the Judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily, then, from this statement of things, that, if the question be of such a description that an answer may or may not criminate the witness, according to the purport of that answer, it must rest with himself who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the Court can demand no other testimony of the fact.'

"That case was cited in Counselman vs. Hitchcock and more recently in Mason vs. United States, both in the Supreme Court of the United States.

174 "Therefore, following that decision, I have before me the decision to determine whether the answer may or may not criminate him. If it is a question of such a description that the answer may or may not criminate him, it must rest with the witness, and if, in such a case, the witness say upon his oath that his answer would criminate him, the Court can demand no other testimony of the fact.

"In this case the defendant has refused to answer the question whether he is a member of the Communist Party and the question whether he has attended certain meetings of the Communist Party, all of which would go back to the basic question of whether he is a member of the Communist Party.

"In view of his testimony, I am of the opinion that this question is of such a description that the answer may or may not criminate the witness. Having said upon his oath that it would criminate him, I can demand no further testimony of the fact.

"It is more important, in my opinion, that these constitutional safeguards be preserved for all the people all the time, than that the Government be permitted to pursue this particular line of inquiry in this particular investigation. Accordingly, the proceedings will be dismissed, the grand jury will return to the grand jury room and resume their labor, the witness will return to the grand jury room, if counsel for the Government wish to ask him further questions. I return the transcript to counsel."

175 Now, in this case, if the Court please, I have all of the argument that was presented here—and there was considerable—on this particular issue. Counsel for the defendant there makes this observation:

"Before answering your question may I state that the case to which I was just referring preceding that was People against Richter, 43 New York Supplement (2d) 114; and, largely to the same effect see In Re Kanter, 117 Federal 356.

"Now the leading Supreme Court case of Counselman against Hitchcock, 142 U.S. 574, has made it clear that he can refuse to answer even as to something which might be a clue. It does not have to be a question that, if he answered, would prove he was guilty of a crime. As a matter of fact, in that case what happened was—"

And then the Court stopped him, and then counsel continues with a question that was asked:

"Do you know whether anyone received rebates from such and such a railroad?"

"And continuing, he refused to answer it. He asserted his privilege, and the United States Supreme Court sustained that assertion."

Now, let me read to the Court this which exists in this case.

176 Here we have the un-American Activities Committee of Congress making certain findings—and I have some of the findings here—that the Communist Party is subversive and an agent of a foreign government. Now under the Smith Act it becomes a crime for a person to deal with foreign governments in the nature as provided in that Act. The witness here is *controted* with the knowledge that the un-American Activities Committee has made such a finding. The Attorney General of the United States has issued illegal, if you please, but nevertheless has issued certain documents which indicate certain organizations are subversive, and amongst those organizations there listed is the Communist Party.

Now, as I understand the term "subversive," it is something that undermines the Government, that is treasonable. Now, here is an officer of the United States issuing a statement that the party to which this witness belongs is a subversive organization. This witness has that knowledge.

Then we have the loyalty order issued by the President of the United States and in that order the President of the United States declares the Communist Party to be a disloyal party. All of these things, and many more are within the knowledge of this defendant, and in addition to

that he finds that there are twelve members of his party—and the Court has our answer and copies of the indictment which are thereto attached—there are twelve members of his party that are indicted, and I submit a reading of the indictment shows that they are merely members of the Communist Party and as such the Government concludes they may be involved in conspiracy to overthrow the Government.

177 None of that is proven. However, it so states.

Now, we have the strange situation that the Government finds itself in. Here the Court says it is not a crime to be a member of the Communist Party; in the Sniderman case the Court holds that mere membership in the Communist Party does not indicate advocacy to overthrow the Government of the United States. These people feel that under those decisions and under the ruling of this Court that perhaps they are not criminals, but who files the informations and who has instigated the proceedings before the Grand Jury? It is the attorneys for the Government. They are the ones, and it is Tom Clark who institutes these proceedings, and he has said that the Communist Party is a subversive party.

Now, what position does this witness find himself in when he comes before the grand jury and he is asked regarding his association with members, other members of the Communist Party, and he is asked regarding the attendance at certain meetings? He finds himself in a position where as a reasonable person he must conclude—and the law does not say that the witnesses must incriminate themselves; the law says that if it tends to incriminate
178 them—now, as a reasonable person he must conclude that if he answers that question—and one question follows another, and one disclosure follows another—then the Government may get certain clues which, standing beyond the questions that he has answered, may open a course of investigation which may call for an indictment.

That is the gist of the decision in the Counselman case. The Court holds in the Counselman case that even though the answer may not tend to incriminate the particular wit-

ness, if it has a tendency to open up a field of investigation which, as we contend in this case, takes that tendency, in view of the ruling of the Attorney General, the orders of the President, the findings of the un-American Activities Committee, this man stands before this Court unable to determine what his rights are, unable to say whether the Judge of this court is correct or whether the Attorney General of the United States is correct, or whether the un-American Activities Committee is correct or whether the President in his executive order is correct.

So what does he do? He says to the grand jury, "I refuse to answer the question on the ground that it may tend to incriminate me."

Now, whether it incriminates him is not the issue; if it tends to incriminate him, if he states under oath, as Judge Pine has said—if he states under oath that he believes that it will tend to incriminate him, then I submit to the Court that this man was entirely within his constitutional
179 rights to say that this question would incriminate him and that he desires not to answer the question on that ground. I submit also that there is no evidence here that this man has been an obstructionist. He has not attempted in any way, shape or form to obstruct the proceedings of the grand jury. He has merely stood on his constitutional rights where he, as a reasonable person under the circumstances and under the events which have occurred throughout the country in the last several years, and of which everyone has common knowledge—he has merely stood on that right as an American to refuse to answer questions which he thinks and under which all of the facts certainly justify his conclusion may tend to incriminate him, and I submit that this witness and I submit that any other witnesses who have appeared before this court, that none of those people have committed contempt of court because they have merely stood on the right which this government says is inalienable and which no one can take from them.

180 Mr. Nevans: Does the Court wish to hear from the Government on this point?

The Court: Yes.

Mr. Nevans: If the Court please, this particular matter has been argued at length before your Honor, both in the first three witnesses' cases when they were found to be in contempt, and again yesterday, and, of course, it will have to be argued again today.

Mr. Menin is not accurate in many of his statements. We are prepared to argue the point of self-incrimination, and, if necessary, submit briefs to your Honor. Mr. Menin has made much of the Costello case, which was a case in Washington, D. C., and he read at length from Judge Pine. What Mr. Menin failed to point out to your Honor, however, was that the Lawson case has been decided in Washington, D. C., the Dalton Trumbo case has been decided, criminal convictions returned in both of those cases, and his group is now taking those two cases, attempting to short circuit the Court of Appeals, directly to the Supreme Court.

The Dennis case came down from the Circuit Court of Appeals of the District of Columbia, the case of Eugene Dennis, United States against Eugene Dennis. We can't give the Court the opinion, but it is reported and the Government's position is entirely sustained.

Now, Mr. Menin is slightly amiss in drawing an analogy between the Costello case and this witness that is
181 before the Court this morning. He stated that in the Costello case, if I understood his statement correctly, the question there was, must a man be required to answer the question: Are you a member of the Communist Party? There is no issue of that type here. This man testified fully on September 21st and again on September 29th regarding his membership in the Communist Patry, the positions that he held, with the exception of naming the committees, the official position within the party that he held, the length of time that he held those positions; but, as has been shown clearly to the Court this morning, he wishes to stop if he must name one other person.

Now, Mr. Menin stated at the outset of his argument that the Government has hauled people into court openly here he would have you believe that the secrecy of the Grand

Jury has been violated by the Government. That is a vicious and ridiculous statement.

The Court: I'm not interested in that question.

Mr. Nevans: I beg your pardon?

The Court: Just answer Mr. Menin's arguments on these cases.

Mr. Nevans: I am attempting to.

The Court: All right, go ahead.

Mr. Nevans: All right. Now, the case of Counselman versus Hitchcock, which Mr. Menin attempts to argue at length—he argues that for over an hour, I believe, to this Court within the past two weeks—it is inapplicable
182 here. He makes passing reference to the Mason case which is found in 244 U. S., but he does not go into that case, and that is the case that is in point here. It treats definitely of the question of self-incrimination and it states that before a witness can refuse or decline to answer on the ground that the answer would incriminate him, the danger must be real and apparent, and the cases hold that he cannot make the decision, that he must indicate to the Court in what manner it would incriminate him.

The Court: What is the citation of that case?

Mr. Nevans: 244 U. S.

The Court: All right, go ahead.

Mr. Menin: While you're at it, get 111 Federal Second.

Mr. Nevans: That is the Camorata case, and that is not applicable here. The Court has consistently held, this Court has ruled repeatedly in these Grand Jury proceedings, that a man cannot sit on that stand nor can he get up in the Grand Jury room and say, "I am the law; I will determine what questions I will answer. I will determine whether I will obstruct this Grand Jury; I will determine whether I will obstruct the processes of this Court."

As your Honor indicated previously, this new concept which these people seek to read into freedom of speech, the

right to remain silent when they choose, is a vicious concept.

If that concept were adopted ultimately it would mean
183 the closing of our courts, the elimination of the Grand Jury. It can be glibly stated, but if it is analyzed and examined it means just that, that any man can come in in a criminal or civil proceeding, take the stand here, be sworn, and state: "I refuse to answer any questions, because they may incriminate me."

So the ultimate is to do away with our form of government if the concept of the right to remain silent is accepted. It is a vicious concept.

We are prepared to submit to the Court a brief on the question of self-incrimination, or argue the matter at length.

The Court: Go ahead and argue the matter.

Mr. Nevans: However, since the Court has heard arguments on this point repeatedly, we don't wish to belabor the Court.

The Mason case, as I recall the facts, involved—

The Court: Just a minute; I'm reading that.

Proceed.

Mr. Nevans: The Mason case is directly in point. It states that the Court must decide whether the privilege may be exercised in each particular case, according to the circumstances surrounding that case, but the witness cannot take it upon himself to do so.

There is no magic in the words: "I refuse to answer on the ground that it may incriminate me." I wish to point out the use of the word, "may" and "might" which appear in
184 this witness' statements. He must indicate to the Court and show to the Court that there is a real and an apparent danger that his answer to the question would incriminate him. That has not been done here. The Government took the position that he need not do this in open court; the Government suggested that if he wished to inform the Court, if he were acting in good faith, how an answer to any one of these questions could incriminate him, that he do so in the privacy of the Court's chambers. Has he wished or offered

to do that? He has not. It is purely an obstructionist tactic. He merely remains there and believes that the Court will accept the bald statement, "If I answer that question it may tend to incriminate me." There is no indication how, no indication of what Federal offense, no indication of any Federal violation.

He stated before the Grand Jury that he had never committed a Federal offense. Now, because the Court has instructed him to answer concerning other people, people other than himself, he now seeks to hide behind this magic sentence that he believes will cause the Grand Jury to continue in recess, to have this court and the Grand Jury completely obstructed and the inquiry closed, and we submit to the Court that it has never been done in the history of the country and it will not be done today.

Is the Court satisfied on the point of self-incrimination? If not, we are prepared to submit a written brief and
185 argue the question.

The Court: I don't care for any briefs.

Mr. Nevans: The Mason case we believe to be directly in point and that is the leading case on this point. The Counselman versus Hitchcock case is merely decided purely on the basis of immunity. There was an immunity statute in existence at that time and the Court stated that the immunity statute was not sufficiently broad; but in the Counselman versus Hitchcock case the objectionable question must of necessity elicit from the witness an answer that he did violate the law, and there is no such question that has been stated here today.

The law, as your Honor has repeatedly held, as evidenced by the Sniderman case, by the Barsky case, by the Bridges decisions and by the cases to which I have referred your Honor this morning—U. S. versus Lawson, U. S. versus Dalton Trumbo, U. S. versus Dennis, U. S. versus Barsky—the courts have consistently held that mere membership in the Communist Party constitutes no crime against the United States.

The Smith Act requires the proof of intent to overthrow

the Government of the United States by violence. There is nothing here on that.

Mr. Menin repeatedly brings up these indictments which are returned in New York City, but he does not know what the Government's proof is, and we submit to the Court, if you please, that the Government there, following the law
186 as established today, must show not by imputation these particular men can be convicted under the Smith Act, because that does violence to its very terms; and, as stated in the Sniderman case, mere membership in the Communist Party cannot impute criminal intent to anyone.

We submit to the Court that the tactics which have been displayed before this Court, before the Grand Jury repeatedly during the past two weeks or more, are obviously obstructionist, and the fact that the Grand Jury has been in recess twice during that time is complete proof of it.

The Government merely asked officers of the Communist Party for certain records of that party. We were refused those records. We took the only other alternative, of summoning other officers of the party in to determine the various branches of the organization, who the officers were, so that we could get records of that nature, but they don't wish to reveal it; they wish to completely obstruct this Court, and they will be successful if the auspicious plea offered here this morning is sustained.

Mr. Menin: If the Court please, I should like to further say to counsel that while I do not agree with him I don't intend to accuse counsel of, as he has me, deliberately making untrue and unfair statements. I do think, however, he is mistaken in some of his conclusions.

187 First of all, I want to say as regards the Trumbo case, the Lawson case, the ones of the Hollywood writers, that in those cases the issue was not determined on the Fifth Amendment but was, rather, determined on the First Amendment—the right to silence.

Now, while I feel that the courts have been wrong in that respect, I bow to the decisions of those courts until the Supreme Court of the United States passes on it. I will say,

however, that I do not agree with counsel in the statement that he made that by the First Amendment the refusal on the part of a witness to answer a question, under the immunity of the First Amendment, would destroy this Government. I would say, rather, that religious liberty—

The Court: I don't care to listen to that kind of argument.

Mr. Menin: —would be destroyed if the First Amendment were not observed.

Now, specifically answering the conclusion of counsel as it applies to the Counselman case and other cases, in the Counselman case, as I recall it, while there is an immunity statute—

The Court: The Court is thoroughly familiar with the Counselman case, so I don't care to hear any more on that.

Mr. Menin: Now, in the case of the United States versus Weisman, which, I think, is a much later pronouncement than the Mason case, 111 Federal Second 260—

188 The Court: What court?

Mr. Menin: I don't have the court? I think it is a Supreme Court decision, however.

The Court: What is the citation?

Mr. Menin: 111 Federal Second.

The Court: That would be the Court of Appeals; that wouldn't be the Supreme Court.

Mr. Menin: I would like to read to the Court the Weisman case. The Mason case, I think, is in the same category. Let me read to your Honor what the Court said in the Weisman case, which I think is very applicable to the situation here.

By way of background, I should like to indicate to the Court in discussing the situation in the Weisman case, that the situation is simply this: In that case the witness was asked questions concerning the receipt of cables at Murray's Restaurant in New York City, and about his business in Shanghai in a certain period. In claiming the privilege the witness offered an indictment against other persons for violation of

narcotic laws, in which cables to and from Shanghai received at Murray's were either recited or referred to; and finally, a new situation to the effect that the district attorney planned to indict other persons, including one whose description rather closely fitted the witness.

189 The Court said: "Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege and at times it permits the suppression of competent evidence, nothing better is available. All this has been long understood, but it is not so clear to what facts the privilege extends. Does it protect more than those which 'tend' to prove a crime? Does it also cover those which can only be clues to the discovery of other facts which, in turn, so 'tend'? All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached. A witness would, for example, be privileged from answering whether he left his home with a burglar's jimmy in his pocket, though that is no part of the crime of burglary. This, as we shall try to show, is as far as need go here."

190 What I think the Court is trying to illustrate there is that you may ask a man whether or not he left his home with a burglar's jimmy in his pocket and the prosecution can well say, as it says here, that the mere owning or the mere possession of that jimmy does not amount to the commission of an offense, and therefore the witness must answer. But the Court says that in those instances where the answer to such a question would lead to other questions which would establish a crime, those questions are privileged under the Fifth Amendment.

Now, counsel says we haven't established where the incrim-

inatory situation may exist. I think we have shown it time and again. First of all, I still must go back to these indictments, because people were indicted. Now, he says I haven't shown what the Government has up its sleeve. Frankly, I don't know what the Government has up its sleeve; frankly, I think the Government is to fall down in *those* case. But that is not the issue here, whether the Government can sustain its case or not.

This man is now here asked the question which may put him in the same position as those people which were indicted, and that is the crux of this case. The question is not whether it will incriminate him, it is whether it will tend to incriminate him. And I think on that point the Court has more than ample evidence on the part of the defense here
191 to show that he is justified in refusing to answer the questions.

In the case of In Re Kanter, 117 Federal 356, the Court said:

"The party best knows what he cannot furnish without accusing himself and where it is not perfectly evidence and manifest that the evidence called for will not be incriminating, the privilege must be allowed."

I submit, if the Court please, that we have more than amply shown that the Court must take judicial notice of those things which are common knowledge. The Court must take judicial notice of the orders of the President of the United States; the Court must take judicial notice of the findings of the Un-American Activities Committee, because those things have been flaunted in the papers time and again and no one can claim ignorance of the fact that those things have existed and have occurred. The Court must take judicial notice of the laws of the United States, and under the Smith Act, if the Court please, where the indictments, as they were in New York, so twisted and so construed the facts as to bring the Communist Party within the purview of the Smith Act, then the Court cannot ignore it, and I submit that the Court has the indictments before it and I submit that under those circumstances no person under any way of perceiving the common law as it exists from time immemorial, should ever be

required to answer a question which may tend to in-
192 criminate him, and this witness stands upon that privilege.

Mr. Nevans: If the Court please—

The Court: I don't care to hear any more argument.

Mr. Nevans: Yes, sir.

The Court: The defendant here having stated on the witness stand that he refuses to change his answer or answer the questions which have been read to him and which he says are an accurate statement of the record before the Grand Jury, it becomes the duty of the Court to decide whether he is guilty of contempt.

I think the case most applicable to this situation is the Mason case, in the Supreme Court of the United States, in 244 U. S., page 362. The witness here has refused—at least he has not offered any explanation or statement why these questions which he refused to answer would incriminate him or how they would tend to incriminate him or convict him of any crime. Some of the questions, it is true, refer to his participation in the activities of the Communist Party, but some of them are entirely foreign to that kind of an inquiry, and for that reason the Court is of the opinion that he is guilty of contempt and that he will have to be confined until he purges himself of contempt, and it is so ordered.

Mr. Kleinbord: Your Honor, I would like to make an observation, if I may. I think what has occurred here just
193 now is obvious and clear. My counsel cites cases for which I have regard. They are the legal opinion of authorities. The counsel for the Government cites cases similarly. They contradict each other.

Of course, as your Honor has just ruled, you base yourself on one of the findings.

Now, what position am I in? I can only take the position as a layman, which I understand clearest, and that is the basic law of the land, because I don't understand the complexities of law, and the basic law of the land, as far as I'm concerned, is still the Fifth Amendment. And just finally,

I feel that I have the greatest authority in the world, your Honor, and I want to cite this authority for my right to keep silent when I believe that is my right. My authority is Jesus, himself, who didn't answer so many questions here at one time, and I take my position from that example that was given then.

And, your Honor, I would like to request at this time, if I may, to make a statement regarding the whole matter.

The Court: Go ahead. The Court has ruled on the matter, however, so I don't think your statement is pertinent, but you may say anything you wish. The trouble is, Mr. Kleinbord, that you people set yourselves up as judges of the law and the facts, when you are not authorized so to do by the Constitution or the law of the land, and you cite your rights under the Constitution, but you must remember that under the Constitution a citizen owes duties to his country,
194 and you people overlook entirely your duties as citizens of this country, as to what you should do, which is to have respect for the lawful authorities set up by the Constitution and carry out their orders and mandates. In other words, the Constitution doesn't grant rights only; it grants certain rights coupled with duties, and you people have no idea or don't say anything about your duties to your country. That's all I care to say.

Mr. Kleinbord: Your Honor, I stand here and speak as an American worker.

The Court: Yes.

Mr. Kleinbord: I own no factory, I own no business.

The Court: Have you got that statement written out?

Mr. Kleinbord: I have part of it; some of it I will have to say as I go along.

The Court: You want to change it or read it?

Mr. Kleinbord: I think some changes will be necessary, yes.

The Court: All right, go ahead. How long will it take you?

Mr. Kleinbord: Just about two minutes; that's all. It's very short. My livelihood depends on my job. Like millions of other workers, I have nothing except what I can obtain by working with my hands and my brain. Therefore, I must doubly guard my personal and political freedoms which enable me to work. I know little about the complica-
195 tions of law. This, however, I do know: I have Constitutional rights. Every American has inalienable and vested rights which were won for us 161 years ago by our forefathers, and which cannot be taken away except at the risk of outlawing democracy.

The Bill of Rights is the bulwark of American democracy for all the people. Destroy it for some and you lay the foundation for destroying—and the groundwork, for destroying it for all Americans. To have these rights, your Honor, means to have also the duty, the responsibility, to cherish and protect them with life if necessary. I revere the Constitution and the democratic traditions and history of my country. I have defended them in the past; I defend them now; I will always defend them.

Your Honor, on the morning of September 29th I was asked the question, "Where do you work?" Now, while I am not in a position to accuse this Grand Jury of revealing this information, it seems to me a strange coincidence, particularly in view of the fact that testimony has been repeatedly published in the newspapers, that I lost my job even after I had been assured by my boss that my job was waiting for me when I was through here.

This question is in my mind, your Honor, and it can't help but be in the minds of many other workers: If, as it appears, one of the objectives of the Grand Jury is to establish a legal blacklist so that workers can lose their jobs through
196 intimidation, or even if it is not one of the stated objectives of the Grand Jury but does, in fact, accomplish this end, then it is violating the intent and purpose of the Grand Jury and should therefore be dismissed.

If this Court can force people to give up their Constitutional rights or to go to jail for life, sentenced without being charged for a crime and remain in jail until they do give up

their Constitutional rights, as happened yesterday with Mr. Bary here, then the Constitution of the United States would become a mere mockery and would not operate for the working people of America.

This sets a dangerous precedent, your Honor, which can endanger the life and liberty of other workers besides myself.

If my Constitutional rights can be taken away from me today, a working man belonging to any other legal political party can also have his rights taken away. It follows from this that it can happen to working people who adhere to another political party who may be in opposition at any given time to any given governmental policy, and similarly to other members of other organizations, like the National Association for the Advancement of Colored People, which opposes, apparently, a governmental policy of "Jim Crow" in the armed forces of the country.

Now, these people may have their rights taken away from them if they oppose such a governmental policy, and similarly members of trade unions who fight for an increase in
197 wages, and if a policy is such that an increase of wages is not granted, these workers can have their liberties taken away from them.

As an American and as a Communist, Your Honor, I denounce with all my energy and ability any proceeding which achieves this end.

I want to thank you, sir, for allowing me to take the stand for this statement.

The Court: All right; if there's nothing more, Court will stand adjourned until ten o'clock tomorrow morning.

Mr. Menin: Before we adjourn, for the record, I would like to make a motion for bail for Paul Kleinbord, so that we may have a record on appeal.

The Court: It will be denied. All right, let the record so show.

Filed October 15, 1948.

Clerk's Note re Government's Exhibits 1 and 2.

199 There was admitted into evidence Government's Exhibit 1, being the testimony of Arthur Bary before the Grand Jury on September 29, 1948, 9:30 A. M. (Printed page 170.)

There was admitted into evidence Government's Exhibit 2, being the testimony of the proceedings before the Court on September 21, 22, 23 and 24, 1948. (Printed pages 38, 42, 50, and 105.)

Clerk's Certificate.

395 I, G. Walter Bowman, Clerk of the District Court of the United States, for the District of Colorado, do hereby certify the above and foregoing pages, numbered one (1) to Three Hundred Ninety-four (394), both inclusive, to be a full, true and correct transcript of the record and proceedings as designated by counsel and as required under Paragraph G of Rule 75 of the Rules of Civil Procedure, in the cases lately pending in this court as follows:

1. In the Matter of the Presentment by the Grand Jury of Witness Arthur Bary, Civil No. 2548,

2. In the Matter of the Presentment by the Grand Jury of Witness Paul Meir Kleinbord, Civil No. 2550; as fully and completely as the same still remain on file and of record in my office at Denver, Colorado.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this 19th day of October, A. D. 1948.

(Seal) G. Walter Bowman, Clerk.

Filed October 19, 1948. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said causes in the United States Court of Appeals for the Tenth Circuit:

Record Entry: Causes Argued and Submitted.

Forty-first Day, November Term, Tuesday, February 8th, A. D. 1949. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard and were argued by counsel, Samuel D. Menin, Esquire, appearing for appellant, M. H. Goldschein, Esquire, appearing for the United States of America.

Thereupon these causes were submitted to the court.

Opinion.

[January 5, 1950.]

Samuel D. Menin, for Appellants. M. H. Goldschein, Special Assistant to the Attorney General of the United States (Max M. Bulkeley, United States Attorney, District of Colorado; Joseph N. Lilly, Assistant United States Attorney for the District of Colorado, were with him on the brief) for Appellee.

Before Bratton, Huxman and Murrah, United States Circuit Judges.

Huxman, Circuit Judge.

All the appellants were called as witnesses before a grand jury regularly convened by the United States District Court for the District of Colorado. Certain questions were propounded to them which they refused to answer on the ground that their answers might tend to incriminate them. All claimed their privilege under the Fifth Amendment to the Constitution in refusing to answer such questions. Formal presentments were lodged against some in the District Court,

and others were presented to the District Court informally by the grand jury. At the hearings before the court, they were directed to answer the questions but again refused to do so on the same ground. They were thereupon, in further proceedings before the court, adjudged guilty of contempt and sentenced to serve various terms of imprisonment. These appeals challenge the correctness of each of these judgments.

The proceedings before the trial court were in some manner irregular and leave much to be desired. In the case of some of the appellants, the records fail to reveal that formal presentments were filed. In the case of Nancy Wertheimer, H. M. Goldschein, Special United States Attorney in charge of the grand jury investigation, stated that the grand jury was "not interested in who they believe in or what their political philosophy is, they are interested in whether or not these particular witnesses hold an office in the Communist Party and whether or not they have in their possession any books or records which show a matter of interest to this grand jury, a matter under inquiry for a violation of a federal statute—not a theory, a belief, or a politicalism." During the proceedings against Irvin Blau, the court stated: "Now I don't know what matter the grand jury is investigating and concerning which this witness was called, but he can't set himself up and say a question would tend to incriminate himself just because he believes that himself." It would seem that it would be difficult for the court to determine whether the witness should be required to answer in the absence of any knowledge as to the general subject of the investigation before the grand jury. However, the presentments filed against the defendants Bary and Kleinbord state that the grand jury "undertook an inquiry concerning various employees of the United States Government who had allegedly made false statements in connection with their loyalty investigation, in violation of Section 80, Title 18 U.S.C., and other criminal laws of the United States." With one exception, all of the questions which the witnesses refused to answer related to their membership in, connection with, or knowledge of activities of the Communist Party of Denver and Colo-

rado. There is much in the record warranting the conclusion that the purpose of the investigation by Goldschein, the Government's Special Representative before the grand jury, was to unearth the activities of the Communist Party of Colorado, rather than to unearth violations of 18 U.S.C., Paragraph 80, as stated in the presentments. However, for the purpose of passing on the right of the witnesses in refusing to answer the questions upon which the judgments in contempt are based, the subject of investigation as stated in the presentment will be accepted as the object of the grand jury's investigation.

As pointed out in the authorities, the constitutional right of a witness not to incriminate himself by his own testimony comes into conflict with the right of the Government to adduce the testimony of every citizen in criminal prosecutions. It might be well at the outset to re-examine the pronouncements of the Supreme Court with regard to this question. The leading case is the early historical case of Burr v. United States, 25 Fed. Cases, 14,692e. There, the court said:

"When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded."

And, further in the opinion, the court said:

"It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

The court then lays down the rule to be that:

"If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not

bount to answer it so as to furnish matter for that conviction."

And,

"In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer."

Counselman v. Hitchcock, 142 U. S. 547, adheres to the rule in the Burr case. The court again stated that:

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself."

And the court quoted with approval the pronouncement in the Burr case that:

"If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not."

Brown v. Walker, 161 U. S. 591, is in line with the preceding pronouncements by the Supreme Court. It, however, points to the danger of extending the principle announced in the Counselman case, and points out that the privilege must not be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, or for the real purpose of securing immunity to some third person.

The question was again before the Supreme Court in Ballman v. Fagin, 200 U. S. 186, in which the rules announced in these preceding cases is adhered to.

The contention is made that Mason v. United States, 244 U. S. 362, is a departure from the strict rule laid down in the Burr and Counselman cases. However, a careful reading of the Mason case does not support such a conclusion. Thus, the court states:

"When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be."

Again it is pointed out that a refusal to answer, based upon a mere possibility of danger, would be to convert a salutary protection into a means of abuse.

From an analysis of these cases, we conclude the rule to be that the witness is not the sole judge as to whether his answer will tend to incriminate him; that when the question arises, it is for the court to determine from all the facts whether the question is of such a nature as might reasonably be expected to incriminate the witness, depending upon the answer thereto. If there is reason to believe that the answer might tend to incriminate the witness, he cannot be compelled to answer; neither can he be required to state why the answer might tend to incriminate him, because that would in itself to some extent constitute giving testimony against himself. Furthermore, a witness may not be required to give an answer which furnishes a link in a chain which would enable the Government to obtain the facts showing his guilt of a crime. It is also clear, from all the cases, that a witness may not refuse to answer because his answer might tend to incriminate others.

Number 3769.

We consider first the appeal of Nancy Wertheimer because it presents questions not common to the other cases. The only question asked her was whether she held any official position in the Communist Party. The court apparently required her to answer on the ground that membership in the Communist Party is not a criminal offense. But according to the grand jury, that was not the subject of investigation. According to its presentment, it was investigating, among

other things, false statements by Government employees, in connection with loyalty investigations. If Nancy Wertheimer had made a false oath or statement with respect to her membership in, or connection with the Communist Party, she would be guilty of an offense. It would thus seem that the question bore reasonable relationship to the crimes under investigation. Under these circumstances, she alone knew whether her answer would incriminate her and she was not required to answer nor was she required to furnish any fact in explanation of her refusal to answer, which would give the Government a lead in ascertaining whether she was an employee or had made an oath or statement. Assuming that she was or had been a Government employee and had made a false oath as to her connection with the Communist Party, all that was necessary to obtain was an answer to this one question. It would have been a simple matter then to check her answer against her application or affidavit and obtain a conviction as a result of her testimony before the grand jury. On the other hand, if she was not or had not been a Government employee, then her answer could not reasonably be expected to incriminate her. The Government's Special Representative before the grand jury, with all the investigating powers of the Government at his disposal, knew, or with reasonable diligence could have ascertained, whether she was or had been such an employee. Due regard to the two conflicting rights—one on the part of the citizen not to be compelled to give any testimony against himself, and the other on the part of the Government to require the testimony of the witness—would seem to require that the Government with all of its investigatory powers which it possesses should have established these preliminary matters before asking the one question which would incriminate her if she had been such an employee and had given a false answer. Goldschein's stock statement to the witness that she was not under investigation and that the grand jury was not proceeding against her, was not warranted. It was not for him to say what the scope of the grand jury's investigation was; neither was his statement a substitute for her constitutional protection.

We, accordingly, conclude that the appellant, Nancy Wertheimer, was justified in refusing to answer and that the court erred in requiring her to do so.

Numbers 3768, 3770, 3782, 3783.

The above numbered cases all present identical questions and may be considered together.

In Number 3768, Jane Rogers testified that she was treasurer of the Communist Party of Denver until January, 1948, at which time she turned over the books and records to another person. When asked to whom she delivered the books, she refused to answer. She first gave as the reason that she did not feel that she should subject a person or persons to the same thing she was going through. Later she based her refusal on the ground that it would tend to incriminate her.

In Number 3770, Irvin G. Blau was asked the whereabouts of his wife, Patricia Blau, and whether or not she held any official connection with the Communist Party. He was also asked, and refused to answer, whether he had collected dues from the members of the Communist Party or assisted in the calling of the membership of the Communist Party for a meeting of any kind. He based his refusal to give the address of his wife on the ground that it was a privileged communication, and his refusal to answer the other questions on the ground that it would tend to incriminate him. A perusal of his entire examination before the grand jury indicates that it was established by his testimony or his answers that he was a member of the Communist Party.

In Number 3782, Arthur Bary was asked whether he held any official position in the Communist Party, to which he replied, "I do." When asked what position he held, he said, "Chairman of the Communist Party of Colorado." He was asked how many clubs, cells or subdivisions of the Communist Party there were in Colorado; who were the officers of each particular club; the names and addresses of all members of each club, cell or subdivision. He was asked to produce the books in which the dues paid by each member in

each club were recorded, or if he did not have them, to state to the grand jury who had possession of these books. He refused to answer all these questions on the ground that they would tend to incriminate him.

In Number 3783, Paul Meir Kleinbord admitted to the grand jury that he was a member of the Party and became a Section worker for the Denver Section of the Communist Party of Colorado. He refused to answer questions propounded to him concerning the names of the members of the Communist Party of Colorado who were working under his direction as Membership Director of the Denver Section of the Party, who appointed him Membership Director, the number of and the names of the branches of the Denver Section of the Communist Party, the persons from whom he had collected dues in the Denver Section, the names of the committees on which he served in the Communist Party, the names and addresses of the officers of each particular club, and the names and addresses of all members of each particular club. He refused to answer these questions on the ground that they tended to incriminate him.

In Number 3769, we have held that within the scope of inquiry by the grand jury and in the posture of the case before the trial court on the presentment in contempt, Nancy Wertheimer was within her constitutional right in refusing to answer any question showing any connection with the Communist Party. But, as pointed out, in these cases each of the appellants voluntarily answered at least one question showing membership in, or a connection with, such Party before they refused to answer further on the ground that their answer might tend to incriminate themselves. By so doing, they waived the privilege that was theirs under the Constitution and were thereafter required to answer the remaining questions propounded to them.[1]

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[1] In Brown v. Walker, 161 U. S. 591, the Supreme Court said:

"Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure."

See, also, Powers v. United States, 223 U. S. 303;
United States v. Johnson, 76 F.Supp.538.

Appellant Blau was also asked the address and present whereabouts of his wife. He refused to answer on the ground that the answer called for a privileged communication between himself and his wife, which he was not required to give. It is not every communication between husband and wife that is privileged. The principle of privileged communications between husband and wife comes to us from the common law. It was adopted to encourage mutual confidence between the parties for the preservation of the marital status. There was thus ingrafted upon the common law the doctrine that all private and confidential communications between the parties are privileged and may not be divulged by either on the witness stand. In order, however, to make the communication privileged, it must be of a private and confidential nature, and must have come to one by virtue of the marital relation.[2] It is difficult to imagine anything less private or confidential than the address of a husband or wife. Furthermore, the record indicates that Blau knew where his wife was and there is nothing in the record indicating that this knowledge even came to him as a result of a communication, confidential or otherwise, from his wife. The witness was not warranted in refusing to answer this question.

Since each of the appellants in Numbers 3768, 3770, 3782, and 3783, without objection, answered at least one question showing their connection with the Communist Party, they thereby waived their privilege under the Constitution and were thereafter required to answer the questions propounded to them upon which the judgments in contempt were based. So also, within the principles hereinabove discussed, they could not refuse to answer those questions propounded to them concerning third parties when it was clear that such questions could not incriminate themselves.

The judgment in Number 3769 — Nancy Wertheimer v.

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[2] American Jurisprudence, Volume 58, Witnesses, Section 375, et seq.;
Wolfle v. U. S., 291 U. S. 7;
Fraser v. U. S., 145 F. (2d) 139;
New York Life v. Ross, 30 F. (2d) 80;
In re Ford's Estate, 261 Pac. 15 (Utah).

United States, is Reversed, and the judgments in Number 3768—Jane Rogers v. United States, Number 3770—Irvin G. Blau v. United States, Number 3782—Arthur Bary v. United States, and Number 3783—Paul Meir Kleinbord v. United States, are each severally Affirmed.

Judgment, Case No. 3768.

Thirty-fifth Day, November Term, Thursday, January 5th, 1950. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court ~~that~~ Jane Rogers, appellant, surrender herself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon her, within ten days from and after the date of the filing of the mandate of this court in said district court.

Judgment, Case No. 3770.

Thirty-fifth Day, November Term, Thursday, January 5th, 1950. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Irving Blau, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Judgment, Case No. 3782.

Thirty-fifth Day, November Term, Thursday, January 5th, 1950. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Arthur Bary, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Judgment, Case No. 3783.

Thirty-fifth Day, November Term, Thursday, January 5th, 1950. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Paul Meir Kleinbord, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon, within ten days from and after the date of the filing of the mandate of this court in said district court.

Petition for Rehearing.

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Petition for Rehearing.

Come now the appellants, Jane Rogers, Irving Blau, Arthur Bary and Paul Kleinbord, and respectfully petition this Honorable Court for rehearing and a reconsideration of the opinion entered herein on the fifth day of January, 1950, insofar as said opinion affects these appellants, and respectfully show:

First.

The Court Overlooked or Misapprehended Appellants' Contention Regarding Their Refusal to Answer Questions Propounded to Them Which Would Show Association of Appellants with Other Members of the Communist Party.

We have stated to the Court in oral argument that appellants refusal to answer questions was based solely on the ground that appellants themselves sought protection under the constitutional provisions against self incrimination. We have pointed out, however, that the refusal of these appellants to answer questions involving others was not for the purpose of protecting others against incrimination, but was based solely on the ground that appellant himself sought protection under the constitutional provisions from self incrimination. For the appellant to answer questions regarding the number of clubs, cells, subdivisions of the Communist Party, together with the names of the members and officers of the various clubs, would render appellants liable to prosecution for conspiracy for violation of Sec. 3 and 5 of the Act of June 28, 1940 (Sections 11 and 13, Title 18 U. S. C.), commonly known as Smith Act, as was the case of the leaders of the Communist Party in New York. (R 93 to 95)

It is a basic rule of law so well recognized as not to require authorities that a single person cannot be subjected to a charge of conspiracy. But a person and his associates can be charged with conspiracy. Thus, when these appellants were individually asked with whom they associated in the Communist Party, or questions which would tend to estab-

lish such fact, they were asked to supply the links in the chain which could well support an indictment for conspiracy under the Smith Act.

"Evidence necessary to show that defendant was engaged in a conspiracy . . . might well be supplied by proof of the names of business associates engaged in violating the law . . . " United States vs. Zwillman, 102 Fed. 2nd 413.

The danger to each appellant lay in the fact that the Communist Party was held by the chief law enforcement officer of the United States to be an unlawful conspiracy under the Smith Act. In the New York indictments (R 93 to 95) the Communist Party was described as "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the government of the United States by force and violence."

The effect, then, of the questions would be to elicit answers which might reveal association with members of an allegedly criminal conspiracy sufficient to serve as proof connecting appellants with the conspiracy or to discover evidence leading to such connection. Where answers may disclose such association, the privilege is properly claimed. (United States vs. Zwillman, supra; United States vs. Weisman, 111 Fed. 2d 260; United States vs. Rosen, 174 Fed. 2d 187)

The concluding portion of the opinion that "they (appellants) could not refuse to answer questions propounded to them concerning third parties when it is clear that such questions could not incriminate themselves" is clearly erroneous in the light of the showing made by the appellants that those third parties may well be the associates in the alleged conspiracy without which information a conspiracy charge could not be founded.

Thus, even if each appellant would have admitted membership in the Communist Party *when he alone* was before the grand jury, unaware of the answers given by others, he did not waive any privilege because individually as a member, he could not have been charged with conspiracy, and

the Court's conclusion that "they waived the privilege that was theirs under the constitution" is not established by the evidence. The Court in its opinion specifically states that Bary was asked "how many clubs, cells or subdivisions of the Communist Party there were in Colorado" and "who were the officers of each particular club," and that Kleinbord was asked "concerning the members of the Communist Party of Colorado who were working under his direction," and that they refused to answer those questions. Those are the questions which would supply the evidence of the alleged conspiracy.

The Court misconstrues the meaning of the language in Brown vs. Walker, 161 U. S. 591, cited in Note 1 of this Court's opinion, relating to waiver of the privilege against self-incrimination. The rule which the Court there enunciated applies to the case of a witness who voluntarily or in the language of the Court "*elects to*" (Page 597) give up or waive his constitutional privilege. But that was not the situation here. They were directed here to answer questions. (R 87, 158, 163) The fact that they answered questions when directed, while refusing to answer others, does not constitute an election to waive, within the meaning of the Brown case.

Furthermore, this Court reversed the Wertheimer conviction on the theory that she might have been a government employee and have previously under oath answered the question as to whether she was a Communist in a way that might now subject her to a perjury charge. But the protection of the Fifth Amendment is broader than this. The refusal of the witnesses to answer cannot depend solely upon whether they had ever been government employees. Questions asked in an investigation presumably related to one subject may open the door to, or constitute a link in, the chain leading to the prosecution of the witness for alleged violations wholly outside the grand jury investigation. (U. S. vs. Rosen 174 Fed. (2) 187, Counselman vs. Hitchcock 142 U. S. 547).

One may, of course, refuse to answer questions which tend to establish the commission of an offense of the matter under

investigation on the ground of privilege against self incrimination. But the constitutional privilege against self incrimination is not limited to the matters under investigation alone. A witness is privileged against answer:

"If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of *any crime*." (emphasis ours) (Burr vs. United States, 25 Fed. Cases 38)

cited by this Court in the opinion rendered in this case.

The Attorney General charged people who associated themselves in the Communist Party as conspirators to violate the laws of the United States. And persons so associated were actually, at the time of this writing, convicted of conspiring to overthrow the government of the United States by force and violence. What better justification could these appellants have in claiming the constitutional privilege against self incrimination than to refuse to give testimony which would make them potential victims of similar indictments and possible convictions.

"In such case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer." (Burr vs. United States supra)

Also cited by this Court in the opinion rendered in this case. It will be noted that these appellants were all under oath when they were interrogated before the grand jury and gave their reasons for refusal to answer.

Second.

The Court Entirely Overlooked the Appellants' Showing That There Was a Denial of Due Process of Law.

The opinion makes no mention whatever to the showing by appellants that they have been denied due process of law. A good portion of our brief is devoted to calling this Court's attention to the failure of the Court to accord appellants due process of law, and the record throughout abounds with in-

stances showing the utter failure of granting appellants these simple rights which have become so much a traditional part of the proper administration of justice.

The only hint which we find in the opinion which would show that the Court was aware of these injustices is the statement that:

"The proceedings before the trial court were in some manner irregular and leave much to be desired."

We say that more, much more is disclosed by the record than mere irregularity. The record in many instances discloses an absolute denial of the basic rights which litigants have in court of justice.

In the cases of Jane Rogers and Irving Blau, there was no presentment and they were convicted of contempt before the presentments were served in the Bary and Kleinbord cases.

There was no contempt committed in the presence of the judge, nor within his hearing or vision. (Camarota vs. United States 111 Fed. 2nd 243)

In contempts committed outside of the presence of the judge and not within his hearing, there is required that the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. (Camarota vs. United States, supra; Cook vs. United States, 267, U. S. 517; 18 U. S. C. 401; Rule 42 (a) Federal Rules of Criminal Procedure)

In the Blau case (R 51 to 53) the government by its special prosecutor, Mr. Goldscheim, absolutely refused to permit defendant or his counsel to see what they were being charged with. Mr. Goldscheim stated to the Court, "I refused to let the defendant (Blau) or his counsel see it." (R 53) The Court throughout that proceeding sustained the government. Can this denial of due process be said to be a mere irregularity? Can it be said that a proceeding of this kind is in keeping with the highest traditions of American justice?

Appellant Blau was given five minutes to consult with his counsel (R 75). After returning to court, his counsel started to make a statement (R 75) to the Court. The Court did not hear counsel, and summarily sentenced appellant to jail, and then called for the next case.

Due Process, as we understand it, even in contempt proceedings when committed outside of the courtroom, requires that accused be given opportunity to be heard. Camarota vs. United States supra; Cook vs. United States supra; People vs. McKinley 11 N. E. 2d 933, 367 Ill. 504; Ex Parte Daws 239 P. 689, 31 Okla. Cr. 397; Cannon vs. State 55 Pac. 2d 135, 58 Okla. Cr. 451; Ex Parte Reily 62 Pac. 2d 1035, 60 Okla. Cr. 217.

In the case of appellant Bary we find that he was first purged of contempt (R 162). Thereafter he again appeared in response to the show cause order and presentment of the grand jury. After argument on certain preliminary motions the Court found him guilty of contempt. There was no taking of evidence and no proof before the Court (R 223 to 224). The appellant, at that time, had not yet been offered an opportunity to assert before the Court his privilege against self incrimination.

Counsel called the Court's attention to the fact that the matter was determined without considering the issues raised by the answer (R 223) and that appellant was not permitted to submit evidence to justify the position taken. (R 224) To which the Court replied, "that isn't necessary." (R 224).

It was only after imposition of sentence the Court almost as an afterthought after the noon recess permitted appellant an oppotrunity to be heard, but even then it was accompanied by a refusal to vacate the order of contempt and the sentence of appellant (R 225).

Appellant Bary was first found guilty and sentenced. Thereafter he was afforded an opportunity to have the court change its judgment: This proceeding was the very converse of what our judicial tradition conceives as due process of

law. Sentence first and trial afterwards is an innovation in our system of justice.

Can this gross denial of due process of law be characterized as a mere irregularity? To cite authorities showing the gross denial of due process of law in the above instant would require setting out an almost endless number of citations.

In our brief we have pointed out the times (page 29, page 31) where the Court has confronted counsel for appellants with the threat to take him into custody or otherwise sternly deal with him. The right to counsel in judicial proceedings is of such ancient origin as not to be open to question. The Supreme Court of the United States has many times indicated that such denial amounts to a denial of due process of law. To hold before counsel the threat that he will be taken into custody or sternly dealt with, very seriously hampers counsel's ability to adequately represent the interest of his client.

We agree with this Court in holding that the proceedings leave much to be desired, but mere say so does not correct the error committed in the denial of due process.

Third.

The Findings by the Court as it Relates to Irving Blau, Number 3770, That "a Perusal of His Entire Examination Before the Grand Jury Indicates That it Was Established by His Testimony or His Answers That He Was a Member of the Communist Party" Is Not Supported by the Record in This Case.

The fact is that Irving Blau's case, insofar as the issue of self incrimination is concerned, is exactly the same as the Wertheimer case (No. 3769). We respectfully call the Court's attention to his testimony (R 30, 31, R 53-61), and nowhere does it appear that there is any evidence which establishes "that he was a member of the Communist Party."

He was first asked regarding membership of his wife,

which he refused to answer on the ground of a privileged communication (R 30-31, R 53). Then he was asked regarding his official connection with the Communist Party and whether he holds any office in the Communist Party, and he refused to answer "on the ground it might tend to incriminate" him. The questions were repeated several times (R 30-31, R 54), and the same answer given.

In the record on page 31 and on page 57 he was asked, "Have you ever collected any dues for the Communist Party?" which question he refused to answer. It will be noted that there are no preliminary answers to questions in the record justifying such a question as a logical follow-up question. It was nothing more than an unfair attempt on the part of Mr. Goldscheim, calculated to leave the impression that at a previous time an admission of membership existed on the part of the appellant Blau. Certainly such a question should not create the presumption of an alleged fact, the existence of which is not supported by the record. The fact is that the record especially indicates a refusal to answer any questions regarding connection with the Communist Party (R 30-31, R 53-54) because of appellant's exercise of his privilege against self incrimination. A witness should only be charged with *the answers he makes* to questions, not with the questions asked. If convictions were based on questions asked, rather than on the answers made, then no person would ever be acquitted, no matter how innocent he in fact were. Our courts would no longer be the haven of refuge where our citizens could apply and expect justice from oppression. All the prosecutors would have to do is ask clever questions calculated to leave the desired impression.

On the basis of the decision in Wertheimer vs. United States, decided by this Court January 5, 1950, insofar as appellant is charged with contempt because of his refusal to answer questions regarding membership in or connection with the Communist Party on the ground that said answers may tend to incriminate appellant, the judgment as to Irving Blau should be reversed.

Fourth.

This Court Erred in Its Ruling Regarding the Matter of Privileged Communications.

"Presumpiton of Confidential Character of Communication. Communications between husband and wife *are presumed to be confidential, and one seeking to put them in evidence has the burden of overcoming the presumption.* The fact that acts or words similar to those done or uttered in private occur or are used in the presence of third persons raises no presumption that the presumably confidential character thereof is released." (emphasis ours) (American Jurisprudence, Vol. 58, Page 321)

Appellant Blau testified that his knowledge of the whereabouts of his wife "at present is based on a privileged communication." (R 31, R 55)

This Court has, in its opinion, stated, "In order, however, to make the communication privileged, it must be of a private and confidential nature, and must have come to one by virtue of the marital relation," and that, "there is nothing in the record indicating that this knowledge ever came to him as a result of a communication, confidential or otherwise." The cases in footnote 2 and the record do not support that conclusion. Those cases support the rule that *communications between husband and wife are by implication assumed to be confidential.* See Fraser vs. U. S. infra and Wolfle vs. U. S. infra. The record clearly indicates that appellant's knowledge of his wife's whereabouts was based on a privileged communication. (R 31 and 53-55)

At the time these proceedings were had, the public press with glaring headlines and articles were denouncing the appellants and subjecting them to all sorts of abuse and ridicule. It was a matter of common knowledge that Mrs. Blau was being sought in order to be subjected to interrogation before the grand jury by Mr. H. M. Goldschiem, special prosecutor for the government.

She communicated with her husband secretly and confi-

dentially regarding her whereabouts, so that he, as her husband, would be reassured as to her safety. *She communicated with her husband solely and only because of the existence of the marital relation between them.* She would have no reason to, and did not disclose her whereabouts to others. This is established by the fact that others who knew her were asked about her whereabouts and they did not know (R 110, 111, 120, 121, 123, 159).

From the facts and circumstances surrounding the refusal of appellant Blau to disclose his wife's whereabouts, no other conclusion can be arrived at except that the communication was made in confidence and in pursuance of the sacredness of the relationship existing between husband and wife. This is not all that we rely upon, *there is a legal presumption that the communication is confidential.* (American Juris, Vol. 58, Page 321 supra)

Wigmore stated the law thus:

"It would seem proper to hold that all marital communications are by *implication confidential*, and that the contrary intention must be made to appear by the circumstances of any given instance. Looking at the habits of married persons and the infrequency of express injunctions of secrecy, this implication of confidence seems more consonant with the facts of life. Such is practically the general judicial attitude, in spite of apparent different phrasing. (Wigmore, Vol. 5, 2d Ed. Sec. 2336) (emphasis ours)

In the case of Fraser vs. United States, 145 Fed. 2d 139 cited in the notes to support the Court's conclusion, we find at page 143 the Court saying:

" . . . *All marital communications are by implication confidential*, and a contrary intention must be made to appear by the circumstances of any given instance. Such is the general judicial attitude . . . "

Can it be said that Mrs. Blau, who was being sought in order that she might be subjected to interrogation by Mr.

Goldscheim before the grand jury, wanted the world to know her whereabouts. Was there any circumstance existing which would overcome the presumption of the confidential nature of the communication. *If there was, the government failed to show it, and the presumption must prevail, as "the one seeking to put them (the communication) in evidence has the burden of overcoming the presumption."* (American Juris supra)

Wolfle vs. United States, 54 Sup. Ct. 279, 291 U. S. 7, also cited by the Court in the note to the opinion, does not support the Court's finding. The United States Supreme Court said:

"Communications between the spouses, privately made, are generally *assumed to have been intended to be confidential and hence they are privileged . . .*"

Regarding this, we call this Court's attention to some of the language used by the Supreme Court. "The preservation of the marriage relationship" is so essential "as to outweigh the disadvantages to the administration of justice."

In the case of In re Ford's Estate, 261 Pac. 15, another case sited by this Court, in note 2 the only testimony one of the spouses was permitted to give is where violence was used, and the Court excluded all other testimony. This is clearly indicated by the comment:

" . . . The other incident testified to, however, seems to us to stand on different ground. There was no violence, actual or threatened, no menacing conduct . . . and no obscene language . . . "

This Court entirely overlooked the provision of the Colorado law which is here applicable. (First Trust Co. vs. Kansas City Life Ins. Co., 79 Fed. 2d 48)

The Colo. law 35 C. S. A. Chap. 177 Sec. 9 reads as follows:

"9. *Who may not testify without consent* — There are particular relations in which it is the policy of the law to en-

courage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

First—A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor shall either during the marriage or afterward be without the consent of the other, *examined as to any communications made by one to the other during the marriage;* but this exception does not apply to a civil action or proceeding for a crime committed by one against the other . . . " (Italics ours.)

This appellant would hardly be entitled to the designation of man, had he cringingly disclosed to Mr. Goldscheim and the grand jury the confidential communication from his wife in order to save himself from being placed in "durance vile." The law, we trust, as it will be pronounced by this Court, will protect him. For surely the law will not lend itself to make cringing cowards of men by forcing them to betray the confidences placed in them by their wives.

Conclusion.

In conclusion, we are constrained to say that the decision rendered in this case, insofar as it affects the appellants, Jane Rogers, Irving Blau, Arthur Bary and Paul Kleinbord, leaves much to be desired in the light of the facts and circumstances surrounding the issues which here exist. The judgment as to them should also be reversed.

Respectfully submitted,

SAMUEL D. MENIN,
Attorney for Appellants,
614 E. & C. Bldg.,
Denver 2, Colorado.

Certificate of Counsel.

I, Samuel D. Menin, attorney for the appellants herein, do hereby certify that the above and foregoing Petition for Re-

hearing is presented in good faith, and not for the purpose of delay.

SAMUEL D. MENIN.

Filed United States Court of Appeals, Tenth Circuit, January 16, 1950. Robert B. Cartwright, Clerk.

Order Denying Petition for Rehearing.

Forty-eighth Day, November Term, Saturday, January 28th, 1950. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard on the petition of appellants for a rehearing herein and were submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

Clerk's Certificate.

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcripts of the records from the United States District Court for the District of Colorado, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in certain causes in said United States Court of Appeals, No. 3768, wherein Jane Rogers was appellant, and United States of America was appellee; No. 3770, wherein Irving Blau was appellant, and United States of America was appellee; No. 3782, wherein Arthur Bary was appellant, and United States

of America was appellee; and No. 3783, wherein Paul Meir Kleinbord was appellant, and United States of America was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 8th day of February, A. D. 1950.

(Seal, U. S. Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Court of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 20

ORDER ALLOWING CERTIORARI—Filed May 15, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below whicl accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 21

ORDER ALLOWING CERTIORARI—Filed May 15, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 22

PATRICIA BLAU, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1950.

CERTIORARI GRANTED MAY 15, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 22

PATRICIA BLAU, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS FOR TENTH CIRCUIT

No. 3846

PATRICIA BLAU, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS—Filed January 20, 1949

Comes now the above entitled appellant and files the following Statement of Points upon which she will rely in the prosecution of the appeal herein.

1. The District Court erred in adjudging appellant in contempt for her refusal to answer questions before the Grand Jury, in that under the Fifth Amendment to the Constitution of the United States appellant had the right to refuse to answer said questions on the ground that the answers might tend to incriminate her.

2. The District Court erred in adjudging appellant in contempt for her refusal to answer questions before the Grand Jury, which questions concerned political activity and associations in that under First Amendment to the Constitution of the United States freedom of thought and advocacy are absolute and the Government has no right to compulsory disclosure of political opinion and association.

3. The Fourth and Fifth Amendment to the United States Constitution dealing with searches and seizures and the privilege against self-incrimination give the citizen a right of privacy and silence against any effort to compel disclosure of his political associations and beliefs.

4. That the District Court denied to appellant due process of law.

[fol. 71] 5. That the sentence of the Court is excessive and unconscionable.

Samuel D. Menin, Attorney for Appellant.

Received a copy of the above Statement of Points this 6th day of January, 1949. Joseph N. Lilly, Asst. U. S. Attorney.

[fol. 72] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

Pleas and Proceedings before The Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

In the Matter of the Grand Jury

THE UNITED STATES OF AMERICA

vs.

PATRICIA BLAU, *Defendant*.

No. 11770.—Criminal

ORDER EXCUSING GRAND JURY UNTIL FURTHER NOTIFIED

At this day comes G. O. Hodgson, Foreman, together with the members of the Grand Jury, heretofore duly empanelled and sworn as grand jurors, and file with the Clerk of the Court the record of the grand jurors concurring in the finding of each and every indictment, and return into court now here the following endorsed true bills of indictment, to-wit:

* * * * * * *

And it now appearing to the Court that the Grand Jurors have concluded their labors and that there are now no matters pending before them;

It is ordered by the Court that they be, and they are hereby excused from further attendance upon the court as grand jurors until recalled at a later date.

Entered On The Docket October 11, 1948.

[fol. 73] IN UNITED STATES DISTRICT COURT

ORDER RECALLING JURORS

At this day, it is ordered by the Court that the grand jurors heretofore duly empanelled and sworn as a grand jury in this court and by the Court excused until further notified, be, and they are now hereby recalled for further

service, commencing on Tuesday, January 4, A. D. 1949, at the hour of 9:30 o'clock a. m., and

It is ordered by the Court that notice be given to the said jurors by the Clerk of this Court.

Entered on the Docket December 1, 1948.

IN UNITED STATES DISTRICT COURT

CERTIFICATE OF THE HONORABLE J. FOSTER SYMES, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO—Filed January 5, 1949.

The undersigned hereby certifies, pursuant to the provisions of Rule 42(a) of the Rules of Criminal Procedure, that he is Judge of the United States District Court for the District of Colorado and that in said capacity and by the authority vested in him, did, on the 20th day of September, 1948, call and duly empanel a grand jury for the District of Colorado and cause a proper oath to be administered to the Foreman, Deputy Foreman and members thereof.

That said grand jury immediately thereafter commenced their deliberations and were in proper session at all times mentioned herein. That on the 4th day of January, 1949, the Court's attention was called to the fact that Patricia Blau, a witness duly summoned before the grand jury, refused to answer questions propounded to her by the said grand jury while under oath.

At a hearing held in open court on said date, at which hearing Patricia Blau appeared in person and by her counsel, Samuel D. Menin, the questions which Patricia Blau had refused to answer before the grand jury were presented to the Court by the Attorney for the Government and the Court then determined that the said questions were proper ques-[fol. 74] tions and that Patricia Blau should answer said questions. The Court then ordered Patricia Blau to answer the said questions, which Patricia Blau, in open court, in the actual presence of the court, and within the sight and hearing of the court, refused to answer in disobedience of the lawful order of this court.

Whereupon, the Court found Patricia Blau guilty of criminal contempt and remanded her to the custody of the United States Marshal, to be brought before the Court for sentence at 10:00 a.m., January 5, 1949.

On January 5, 1949, Patricia Blau was brought before the Court and was committed to the custody of the Attorney General, or his authorized representative, for a period of one year, from and after the 5th day of January, 1949.

The undersigned presided at the hearing of the cause herein and the matters set forth in this certificate constituting the criminal contempt occurred in his actual presence and within his sight and hearing.

Dated at Denver, Colorado, this 5th day of January, 1949.

J. Foster Symes, Judge of the United States District Court for the District of Colorado.

IN UNITED STATES DISTRICT COURT

In the Matter of Contempt Proceedings Against PATRICIA BELL BLAU

TRANSCRIPT OF PROCEEDINGS—January 4, 1949

Before: The Honorable J. Foster Symes, United States District Judge

Appearances: For the Government: Mr. Joseph N. Lilly, Assistant United States District Attorney. For the defendant: Mr. Samuel D. Menin, Attorney at Law.

[fol. 75] Whereupon, the following proceedings were had, to wit:

The Court: The Court is informed the District Attorney has a matter to take up with the Court. What is it?

Mr. Lilly: We have, Your Honor. If the Court please, on the 20th of September Your Honor called a grand jury, which was duly empaneled, and a subpoena was issued for a witness at that time, named Patricia Bell Blau. The marshal was unable to get service on her while the grand jury was in session at that time, but she was served with a subpoena at a later date and was brought before Your Honor and was instructed by Your Honor at that time to report at the next session of the grand jury, and the date for the session was set as of today.

Mrs. Blau did appear this morning and was called by the grand jury as a witness in connection with a matter that they had under consideration and upon being propounded

certain questions refused to answer those questions on the grounds that she might in some manner tend to incriminate herself, and we desire to present to Your Honor this matter, a matter of contempt, asking Your Honor to pass upon the propriety of the questions propounded, and if they are proper to instruct the witness to answer them, and upon her refusal to do so we will ask Your Honor to fix a definite punishment.

We are prepared to present the questions to Your Honor, and the witness is in the courtroom and represented by counsel.

The Court: Has counsel anything to say?

The Court: Has counsel anything to say?

Mr. Menin: If the Court please, this matter has just come to my attention, that the matter will be presented to the Court. The inconsistency of the Government is rather strange here. First, in one instance we are presented with a presentment and in another instance with a summary [fol. 76] proceeding. Now, if this is a summary proceeding, we don't think that a matter of this kind can be taken up without first being given a copy of the charges so that we may properly defend ourselves against them.

The Court: You have just heard the statement of the District Attorney as to what the matter is. He has fully informed you.

Mr. Menin: I have, but I think we are certainly entitled to some time to prepare our defense, and all we are asking is that the Court give us such time. If counsel does not care to file any charges, I question the validity of this type of proceeding, but if counsel cares to file charges, we should like to have a copy of those charges so that we can know what questions were asked and what answers were made so that we can properly defend ourselves against those charges.

The Court: We will give you an opportunity to know what the questions are. Have you anything else?

Mr. Menin: I would like to have a copy of the questions which are the subject of this proceeding at this time.

The Court: We will give them to you and give the witness an opportunity to answer them now, or state whether she will or not.

Mr. Menin: We don't have to proceed with this haste without an opportunity of going into the matter with my client so that I can——

The Court: Your client can tell you what happened and what she is here for. You know as well as I do and she knows. This is just a proceeding we have been through here a half-dozen times.

Mr. Menin: That may all be true, Your Honor, but we didn't expect this, to appear here this rapidly. The last time the Government proceeded under a presentment; this time they are proceeding in sort of a summary proceeding without any presentment.

The Court: I see no objection to that.

[fol. 77] Mr. Menin: We certainly object to it, because we feel that we are being denied due process of law, without being given an opportunity to properly prepare a defense to whatever charges the Government may have.

The Court: Don't you know what the charges are?

Mr. Menin: I have a general idea, is all, Your Honor.

The Court: You have a very specific idea haven't you?

Mr. Lilly: That's right.

Mr. Menin: I know what has happened in other cases. I had no right to presume that this case was identical with other cases, or that this is the same sort of a situation.

Mr. Lilly: May I clarify one thing, Your Honor please? I don't mean to interrupt, but the purpose of the witness being here now is to have Your Honor pass upon whether or not the questions are or are not proper. There have not as yet been any charges filed against this witness. Now, if she refuses to answer, upon Your Honor's instructing her to do so, then we have a matter of contempt; but the first problem would be to determine whether or not the questions are or are not proper. That's what she is here for, and we can't wait forever to get those answers while the grand jury is in session.

Mr. Menin: We certainly have a right to defend ourselves and to present to the Court our position as to the propriety of the questions.

The Court: You will have that opportunity, Mr. Menin, as you have always had it before.

Let the witness take the stand.

Mr. Menin: We object to this proceeding, and let the record show that the defendant, Patricia Blau, or the witness Patricia Blau, has not received any formal charges and is being brought into court under a summary proceeding, without counsel having an opportunity to examine the

questions which were propounded and the answers given [fol. 78] so that a proper defense may be made in connection with it.

Mr. Lilly: I would like to have the record show that I am herewith handing to Mr. Menin, with Your Honor's permission and Your Honor's order, a transcript of the proceedings before the grand jury this morning, if Your Honor is so inclined for us to do so.

The Court: Yes. All right.

Mr. Menin: I would like to have the record show——

Mr. Lilly: Just a minute, please. I would like to bring to Your Honor's attention the original of the transcript for Your Honor to see.

Mr. Menin: Let the record show that having just received a copy of the questions which were propounded to the witness in the grand jury room, counsel now asks for a reasonable continuance to properly prepare a defense to any charges that the Government may make.

The Court: Put the witness on the stand and call attention to what questions she refused to answer.

Mr. Lilly: All right.

Mr. Menin: Save an exception. May we have a ruling on the request I have just made?

The Court: It is denied.

Mr. Menin: Save an exception.

The Court: Take the witness stand, madam.

Mr. Menin: May I have an opportunity to consult with the witness before she takes the stand?

The Court: How much time do you want?

Mr. Menin: Oh, about five minutes.

The Court: All right, go ahead.

(Whereupon a short recess was taken.)

[fol. 79] Patricia Bell Blau was by the Clerk of the Court duly sworn to testify the truth, the whole truth, and nothing but the truth.

Mr. Lilly: If Your Honor please, on page 2 of the transcript which I have given Your Honor, and a copy of which has been furnished to Mr. Menin, at the bottom of the page you will find the question:

"Mrs. Blau, do you know the names of the State officers of the Communist Party of Colorado?"

There is a certain amount of colloquy that goes on after that, at which time I informed the witness——

The Court: She answered that question.

Mr. Lilly: No, sir, she did not. The answer is found at the bottom of page 3. She says:

"Answer: Yes. Well, I would—I feel that I should not answer that question because since there are twelve leaders of the Communist Party at present under indictment under the Smith Act in New York City by the Department of Justice, any evidence which I may give or any testimony which I may give which associates myself with any leaders of the Communist Party will therefore incriminate myself, and I therefore feel that I should not answer that question on the grounds that it may tend to incriminate me."

She refused to answer the question upon those grounds.

Mr. Menin: Now, pardon me, Mr. Lilly. At this time, if the Court please, I have certified copies of the indictments which I should like to have marked as exhibits, and I desire to offer them in evidence.

(Whereupon documents were marked Defendant's Exhibits 1 and 2 for identification.)

Mr. Menin: At this time, if the Court please, I desire to offer in evidence Exhibit 1, which is an indictment returned against one Jacob Stachel, charging membership, in [fol. 80] the Communist Party as a violation of law, and also Defendant's Exhibit 2, which is an indictment charging one William Z. Foster, Eugene Dennis, also known as Francis X. Waldron, Jr., John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, also known as Israel Regenstreif, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, also known as Arno Gust Halberg— This indictment is a conspiracy indictment charging merely that these people are members of the Communist Party and as such conspired to advocate the views of Marx and Lenin, and as such conspired to overthrow the Government of the United States by force and violence.

These indictments are based on the fact that the defendants, in both the individual indictments and in the indictment for conspiracy—are merely based on the fact that they are members of the Communist Party.

The Court: They are not charged with being members of the Communist Party, are they?

Mr. Menin: In this indictment? Yes, these indictments do so charge.

The Court: That isn't the crime they are charged with here.

Mr. Menin: That's all that indictment says they are. I think Your Honor so found, according to the record in the previous cases.

The Court: The charge in this indictment is really that they advocate the overthrow and destruction of the United States Government by force and violence.

Mr. Lilly: That's right.

Mr. Menin: And that is based solely on the allegation that the defendant is a member of the Communist Party and nothing more.

If the Court please, I would like to quote Your Honor [fol. 81] on page 80 of the transcript in the other cases where Your Honor makes this comment:

"This indictment, Mr. Menin, is for violation of Section 10 and 13, Title 18 of the U. S. Code, and the charge simply is that the defendant is a member of the Communist Party.

"Mr. Menin: That's right."

Then Your Honor, of course, indicated that you did not consider membership as being criminal. But what we desire to point out, it is not what the Court considers is criminal; the fact is that this same Department of Justice that is now prosecuting these cases had those indictments returned, and this witness claims her immunity on the basis of the fact that other members of the Communist Party, solely and simply because they are members of the Communist Party, have been charged with violation of the Smith Act.

The Court: They haven't been convicted, have they.

Mr. Lilly: No, sir.

Mr. Menin: The mere fact that they are charged is enough for her to apprehend the danger——

The Court: Will you answer my question?

Mr. Menin: No, they haven't been tried yet.

The Court: What?

Mr. Menin: They haven't been tried yet, but the fact that

they are charged—I don't think the Government goes out to file charges if they don't at least hope to get a conviction.

Mr. Lilly: I might say this: All she is asked here is whether or not she knows the names of the officers. That doesn't indicate any——

Mr. Menin: Yes, but on one of those questions——

The Court: Just a minute.

Mr. Lilly: Mr. Menin, let me finish my statement.

[fol. 82] Mr. Menin: All right, go ahead.

Mr. Lilly: All she is asked is whether or not she knows the names of the State officers of the Communist Party of Colorado. There is nothing in that question that would tend to incriminate this witness or link her with the Communist Party in any degree whatsoever. But she stands on her constitutional rights, even in so far as revealing the name of an officer of the organization. There is nothing incriminatory about knowing who they are.

The Court: The Court passed on this so often before that no further discussion in necessary.

Mr. Menin: Very well.

The Court: Madam, did you hear the question?

Mr. Menin: Pardon me. May I have the ruling on the admission in evidence of these indictments?

The Court: I thought I admitted them in the record.

Mr. Lilly: Let the record show we object to the admission of those exhibits.

The Court: Madam, did you hear the question Mr. Lilly read from the proceedings this morning before the grand jury?

Mrs. Blau: I heard the question Mr. Lilly asked me. He asked me the same question this morning.

The Court: What was your answer?

Mrs. Blau: My answer, in substance, was that since there are twelve national leaders of the Communist Party under indictment at this moment by the Department of Justice in the Southern District of New York, I believe that my expressing knowledge, intimate knowledge, of the Communist Party in this state would tend to incriminate me under the Smith Act, because the Smith Act specifically says that they wilfully and knowingly did conspire with each other and with divers other persons to the grand jurors unknown, and that my answering a question which would associate myself [fol. 83] with the leadership of the Communist Party would tend to incriminate me under the Smith Act.

The Court: Such is not the law, madam, and this Court has so held, and directs that you shall answer the question yes or no. Do you care to answer the question?

Mrs. Blau: I believe that my having to answer that question is a violation of the Fifth Article of the Bill of Rights.

The Court: What does that say?

Mrs. Blau: I therefore will not answer it.

The Court: What does that say?

Mrs. Blau: It says that a person has a right not to have to make statements which might tend to incriminate them.

The Court: How would it incriminate you? What would it incriminate you of?

Mrs. Blau: Because it would associate me with wilfully and knowingly conspiring with divers other persons to the grand jurors unknown to organize as the Communist Party of the United States, which is what the indictment in New York says.

The Court: That is a proceeding in an entirely different court than this, madam.

Mrs. Blau: I understand.

The Court: You are not charged with any crime here.

Mrs. Blau: I understand that the Department of Justice and the rulings of the Department of Justice are applicable to this as well as to any other court.

The Court: The Department of Justice does not run this Court and we do not follow their rulings. They have no control over the decisions of this court.

Now, the Court directs you to answer the question, madam. Do you refuse or not?

[fol. 84] Mrs. Blau: I will not answer that question because it is a violation of the Fifth Article of the Bill of Rights.

The Court: All right. What is the next question?

Mr. Lilly: Your Honor please, may I offer this one suggestion: The other cases which we have handled here, Your Honor has extended to the witnesses an opportunity to tell you in private the manner in which they have considered these answers might tend to incriminate them. I wonder if Your Honor wants to extend to this witness that opportunity.

The Court: If she wants to do it, all right, let her say so. Go head with your next question.

Mr. Lilly: Do you want to — that or not?

Mrs. Blau: I believe I have expressed publicly my reasons.

Mr. Lilly: All right. Now, on page 5 of the transcript at the top of the page, the second question:

"Do you know what the organization of the Communist Party of Colorado is, the table of organization of the Communist Party of Colorado?"

And the answer was: "Well, wouldn't that be implying exactly the same intimate knowledge and association with the Communist Party? It isn't anything that I have any reason to refuse to reveal; it's a very common structure, but I think that my stating that I knew exactly how the Communist Party was organized would tend, or would constitute an admission of an intimate association.

"Question: You feel that it might tend to incriminate you for the violation of a Federal offense?

"Answer: Under the Smith Act."

The Court: What is her answer to that?

Mr. Lilly: That is the answer, "Yes, sir."

The Court: Do you still persist in that answer, madam?

[fol. 85] Mrs. Blau: Yes, I persist in the answer, that my sole answering a question as to show that I have intimate knowledge of the structure of the Communist Party, at a time when Attorney General Clark has declared the Communist Party to be a subversive organization, with Truman's loyalty order, has declared it to be an agent of a foreign power, expressions with which I disagree—however, they are the law of the land at the moment—and I therefore feel that I must uphold my constitutional right not to have to answer these questions.

The Court: The Court directs you to answer, madam. Will you do it?

Mrs. Blau: I will stand upon my constitutional rights not to answer, Judge Symes.

The Court: All right; take the next question.

Mr. Lilly: The next question, Your Honor please, is near the bottom of the page:

"Question: Were you ever employed by the Communist Party of Colorado?"

And the answer to that question is found in the middle of page 6, after certain colloquy.

The Court: Where is the question?

Mr. Lilly: "Were you ever employed by the Communist Party of Colorado?" And about the middle of page 6 you will find the answer:

"Answer: My political activities and beliefs are a matter of public knowledge, of public record. I am proud of them, but I feel that at this moment saying directly that I have been employed by any party is a violation of my rights under the first amendment, which says that no one is answerable to anyone for his political beliefs or associations or views."

That was her answer.

The Court: That is a correct statement of the law, [fol. 86] madam, but that isn't the question involved here. Do you refuse to answer that question?

Mrs. Blau: I believe that this question is an inquiry into my political beliefs and activities, and I uphold my right not to have to answer as to my religious beliefs or as to my political beliefs.

The Court: This does not ask you that. The question is not your beliefs; the question is, "Were you ever employed by the Communist Party of Colorado?" That does not mean that you were ever a Communist, or anything of that kind, or that you believe in the Communist Party.

Mr. Menin: We desire if the Court please,——

The Court: Just a minute, Mr. Menin. Will you please be seated?

Mr. Menin: On this matter——

The Court: Will you please be seated, Mr. Menin?

Mr. Menin: Very well.

The Court: Go ahead. You don't care to answer that question?

Mrs. Blau: Will you please repeat the question?

Mr. Lilly: "Were you ever employed by the Communist Party of Colorado?"

The Court: That doesn't mean were you ever a member. Did you ever work for them?

Mrs. Blau: I will refuse to answer that question on the same grounds.

The Court: All right.

Mr. Menin: Now, if the Court please, let the record show that the witness has refused to answer that question for the grounds previously given, and for the further reason that the answer may tend to incriminate her.

The Court: All right.

[fol. 87] Mr. Lilly: The next question is the following question:

"Question: Even though your activities have been a matter of public record, as you say, you refuse to answer on the grounds that it might incriminate you for the violation of a Federal offense?

"Answer: That, and also the asking of the question is a violation of my rights under the first article of the Bill of Rights which guarantees that no person shall have to answer for his political or religious views."

The Court: Do you want to change your answer, madam?

Mrs. Blau: I stand on that answer.

The Court: You refuse to answer the question as the Court directs you to?

Mrs. Blau: I stand on my constitutional rights not to answer the question.

The Court: All right.

Mr. Lilly: On page 7, Your Honor please, the first question:

"Question: Mrs. Blau, did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?

"Answer: I shall have to answer that the same, that as long as the twelve leaders of the Communist Party are under indictment by the Department of Justice, as long as that indictment stands, I would be associated myself with the conspiracy with which they are charged.

"Question: Then you desire to give the same answer for the same reason?

"Answer: I desire to give the same answer for the same reason."

The Court: The Court directs you to answer the question, madam. Will you do it?

[fol. 88] Mrs. Blau: I beg your pardon, Mr. Lilly. Would you mind repeating the question?

Mr. Lilly: The question was: "Did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?"

Mrs. Blau: I feel, also, that under the Smith Act I would

be incriminating myself by answering that question. I stand on my constitutional rights not to answer the question.

The Court: You are simply asked, did you have certain books in your possession? It is no crime to have books in your possession, of the Communist Party or anyone else, madam, and yet you refuse to answer?

Mrs. Blau: It may not be a crime considered in this court.

The Court: What?

Mrs. Blau: It may not be considered to be a crime in this court, Your Honor, but the Department of Justice has ruled——

The Court: The Department of Justice doesn't make the laws of the United States.

Mrs. Blau: The Department of Justice has the ability to indict people under the laws of the United States, and Attorney General Clark has issued a loyalty order as a result of which people are being fired from their jobs, and whether or not it is a law or it is not a law, still it is effective in this land and I do not wish to answer because the answer would tend to incriminate myself.

The Court: All right. The Court directs you to answer, and assumes that you refuse. What is next?

Mr. Lilly: The next question is toward the middle of the page:

"Question: Did you turn the books and records of the Communist Party of Colorado over to any particular person?

[fol. 89] "Answer: I shall have to decline to answer that for the same reason, that it may tend to incriminate me, and also under the President's loyalty order declaring the Communist Party to be an agent of a foreign power, which I do not believe, but as long as the President's loyalty order is in force in this country I have to accept that."

That question simply dealt with whether or not she ever turned the books and records of the Communist Party over to any particular person, and she refused ao answer.

The Court: Do you still refuse to answer, madam?

Mrs. Blau: I do, on the ground that my answering whether or not I turned over books assumes first that I knew of the existence of such books; second, that I had them in my possession in order to be able to turn them over, and I therefore stand on my constitutional rights not to answer that question.

The Court: Do you deny that you ever had them in your possession?

Mr. Menin: We object.

Mrs. Blau: I stand on my constitutional rights not to answer that question, Your Honor.

Mr. Lilly: Your Honor rules it is a proper question.

The Court: It is a proper question, and I direct the witness to answer and she refuses to answer.

Mr. Lilly: Right at the bottom of page 7:

"Question: Do you know the names of any persons who might now have the books and records of the Communist Party of Colorado?"

The answer is at the top of page 8:

"Answer: I shall have to answer that in the same manner, that I can't answer it because it would tend to incriminate me under the Smith Act."

The Court: Is that your answer, madam?

[fol. 90] Mrs. Blau: Yes, Your Honor.

The Court: You refuse to answer?

Mrs. Blau: I stand on my constitutional rights not to answer.

The Court: The Court directs you to answer and you refuse, I take it.

Mr. Lilly: The next question:

"Could you describe to the grand jury any books and records of the Communist Party of Colorado?

"Answer: I cannot actually, because the knowledge of the books and records of the Communist Party would tend to incriminate me of a Federal offense under the Smith Act."

The Court: You refuse to answer, madam? The Court directs you to answer that question.

Mrs. Blau: I stand on my constitutional rights not to answer that question, Your Honor.

The Court: All right.

Mr. Lilly: Those are the questions, Your Honor.

The Court: Do you want to be heard, Mr. Menin?

Mr. Menin: If the Court please,——

The Court: I will give you five minutes to speak.

Mr. Menin: We desire to tender our most vigorous objection and protest to this type of proceeding, first, for the

reason that it is a summary proceeding without counsel for the witness having any prior knowledge that they would be called upon to answer these charges more than five minutes before the charges were brought into court. The facts, as I understand them, are that this witness was to appear before the grand jury this morning. She did so appear. That she was told to return at 1:30 to further testify before the grand jury; at least she was not told that she was to be up here in court; that upon her returning at 1:30 she [fol. 91] was brought before the Court and, without having an adequate opportunity to adequately advise herself as to the charges that are being made and without having an adequate opportunity to prepare for a defense in this matter, she is brought into court and summarily dealt with.

Now, we think that that is a violation of the most sacred rights under the Constitution, the right to due process of law, the right to have a fair hearing on a charge that is filed so that the defendant may properly and adequately defend herself.

As we have indicated and as the Court has now recognized, there are indictments returned in New York and, as I understand it, the Court has admitted into evidence the certified copies of the indictments which we have submitted. Those indictments charge in very simple language——

The Court: I am familiar with them. It isn't necessary to read them.

Mr. Menin: All right. They charge simply that the defendants are members of the Communist Party. Then the conclusion is arrived at by the Government that as members of the Communist Party they are engaged in a conspiracy to overthrow the Government of the United States.

In the individual indictments they don't even go that far; they merely say "that from on or about July 26, 1945, and continuously thereafter up to and including the date of the filing of this indictment, the Communist Party of the United States of America has been a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."

Now, in view of these indictments, this defendant was brought before the grand jury and asked certain questions regarding activity, the table of organization, and the intimate knowledge that she may have in connection with the Communist Party. We say that under the case of Counsel-

man against Hitchcock, which has been adequately argued [fol. 92] here, I think, at great length, and under the Wiseman case and under the case of the United States against Zwillman, and several other cases, the Court has held that the question does not necessarily have to be one which would actually incriminate *the*, but if it opens up an evidentiary lead which could be pursued by the Government in an effort to bring about an indictment, then the witness has a right to refuse to answer.

Now, in one of the cases which we have cited in our brief before the Court of Appeals, the case of Ballmann against Fagin, 200 U. S. 186, the question of a book was asked and here is what the Court said.

Let me give the Court a little more of the background of this case.

The Supreme Court in Ballmann vs. Fagin, 200 U. S. 186, 50 Law Edition 433, again applied the rule of privilege in a case which arose out of a grand jury investigation of criminal liability of some employe of a National Bank where large sums of money disappeared from the vaults. The grand jury asked a witness to produce his cash book, he refused and was then asked questions "the manifest meaning of which was to fasten upon him that there was a cash book." Likewise, he refused to answer.

In a contempt hearing, the witness offered to show that there were actions pending against him and others charging them with conducting a scheme of gambling known as a "bucket shop." The trial court was reversed on its finding of contempt. The Court recognized that a cash book, if the witness kept one, would be likely to disclose either receipt of missing cash or participation in bucket shop activities. From this alone, with nothing more, the Court held the witness was entitled to claim privilege.

I want to call the Court's attention here that any books that this witness might have had, if there were such books, would have to disclose any connection that she might have had with the Communist Party.

[fol. 93] The Court: What did you say?

Mr. Menin: That any books she might have had, which are records of the Communist Party, would have a tendency to establish a connection, which would be the evidentiary lead that the prosecution may need to establish her connection with the Communist Party.

From this alone, with nothing more, the Court held the

witness was entitled to claim privilege in connection with the demand to produce the book as well as questions designed to establish its existence. The decision is of special significance in that it reaffirms the extension of the privilege not only to prove a criminal offense but also to questions designed to obtain evidentiary leads to obtaining such proof.

In holding that the possible contents of the cash book, in the light of the investigation disclosed sufficient cause for a claim of privilege against the production of the cash book, the Court said:

"The book very possibly may have disclosed dealings with the person or persons naturally suspected, and especially in view of the charges that Ballmann kept a 'bucket shop,' dealings of a nature likely to lead to a charge that Ballmann was an abettor of the guilty man. If he was guilty, he was guilty of a misdemeanor under Revised Statutes, Section 5209, etc., and was no more bound to produce the book than to give testimony to the facts which it disclosed."

Now, in this it is clear that the Court's holding rests largely on the proposition that answers to these questions might provide the Government with evidentiary leads through which they might obtain the cash book or its contents. It is equally plain that in reaching this result in Ballmann vs. Fagin the Court knew it as applying settled law:

"And without any inclination to enlarge a witness' rights beyond the settled requirements of law, we think that the privilege might extend to any question, the manifest object [fol. 94] of which was to prove possession or control as a preliminary to calling for the book."

The scope of the privilege defined by these cases has never been reduced.

I want to point this out to the Court, that while the Court has many times—and we appreciate the Court's feeling in the matter—has many times indicated that it is not a crime to be a Communist in Colorado, I don't think the Court would go so far as to say it is not a crime to be a Communist in New York, because Communists have been indicted for being communists and nothing else.

The Court: They weren't indicted in New York or anywhere else for being Communists, and you know that.

Mr. Menin: That's all they charge in the indictment, Your Honor.

The Court: It does not make any such charge.

Mr. Menin: Your Honor admitted that.

The Court: The charge is and the law is that they are indicted for belonging to a society which advocates the overthrow of the Government by force, and that does not mean they are guilty of a crime for being a member. That doesn't bring the Communist Party in it at all.

Mr. Menin: Here is what the charge is——

The Court: I've read it. It isn't necessary to read it again.

Mr. Menin: All right. He was a member of the Communist Party. In any event, it certainly creates a situation where this witness may well apprehend danger to herself by reason of the fact that such indictments were returned, irrespective of the construction that the Court may put on it. The fact is that that is what they were, members of the Communist Party.

Now, we contend that it is not up to the defense to come before a grand jury and be made the potential victims of [fol. 95] their own testimony; we contend further that under the first amendment to the Constitution the rights to political beliefs are such that the Government cannot intrude upon them. In other words, a person may entertain any political belief he desires.

The Court: Who said that she cannot entertain any belief she desires?

Mr. Menin: Just a second. And we say that it is an intrusion by the Government if the Government inquires into the political beliefs of any individual, and it is as much an inquiry by the Government whether the grand jury inquires about it as when any other agency of the Government inquires about it.

We submit, therefore, that in view of both the first and the fifth amendments—the fifth amendment because there have been activities on the part of the Department of Justice which establish beyond any question that there is a concerted effort on the part of the Attorney General to get after Communists in the United States; that is established by the indictments, that is established by his own list of subversive organizations, and is established also by the findings of the un-American Activities Committee which

has in effect said that the Communist Party is an agent of a foreign power.

Now, if she were to answer that question, in view of the finding of the un-American Activities Committee, she would then be subjecting herself to another violation of the law, which would be the failure to register as an agent of a foreign power, in view of the finding of the un-American Activities Committee, and in view of all those things——

The Court: Where was she asked, in this record, if she was a member of the Communist Party?

Mr. Menin: She was asked if she knew the members or the leaders of the Communist Party.

The Court: That's different from being a member of the party.

[fol. 96] Mr. Menin: All right. She was asked whether she had the books of the Communist Party. She was asked the table of organization of the Communist Party; she was asked whether she was employed by the Communist Party—all of which implies an intimate knowledge of the Communist Party, which would show connections sufficient to connect her under the Smith Act, and I submit——

The Court: Your argument is that it is a crime to belong to the Communist Party, and you don't know your client to be connected with it. That's the view I take of what you say here.

Mr. Menin: No. Let me get myself straight on that. While we do not contend that it is a crime to be a member of the Communist Party, we do contend that in so far as the Government has charged in New York, that it is a crime; that we therefore have the right to claim the privilege. Now, if it is not a crime to be a member of the Communist Party, then we charge the Government has no right to inquire into the political beliefs, views and activities of any citizen.

The Court: Where did they ask her here what her political beliefs are?

Mr. Menin: That is all asked here.

The Court: Which one of these questions I have directed her to answer?

Mr. Menin: All right: "Mrs. Blau, do you know the names of the State officers—"

The Court: What page are you reading from?

Mr. Menin: Page 2. "Do you know the names of the State officers of the Communist Party?"

Her answer to that is——

The Court: I mean, the question does not ask her if she is a member.

Mr. Menin: No, but it implies an intimate knowledge.

Now, the Government, I will concede, if the Court please, [fol. 97] in this particular proceeding has very cleverly worded its questions, but the fact is that the evidence that they seek to obtain from this witness will give them the evidentiary leads to the alleged crime that was charged in New York, although we don't admit that it is a crime to be a member of the Communist Party.

The Court: I don't know what her beliefs are. You may know, so you're in a better position to discuss the question that I am, but I haven't seen that she has stated here that she belongs or doesn't belong to any party or church or anything else.

Mr. Menin: She is asked the names of the State officers.

The Court: I know, but she may know those. I may know who the President of the United States is, but yet I don't belong to the same political party or don't vote for him.

Mr. Menin: These questions are designed, if answered, to establish by implication a connection with the Communist Party. I don't think we can get away from that.

The Court: I can't agree with you, and I don't care to hear any more.

Mr. Menin: Then I simply should have had an opportunity to prepare a defense for this instead of being brought here summarily without having an opportunity to go into this matter.

The Court: Now let me tell you something, Mr. Menin: This thing has been going on in this court here for two or three months and you have always appeared for these people, and the Court has given you every opportunity to present your argument. You have come in here with books and you have argued it on several different occasions and the Court is fully advised of your views, and you know very well from the record that the Court doesn't agree with you.

Mr. Menin: I have never seen these questions——

[fol. 98] The Court: I don't care to hear from you any more.

Mr. Menin: I have never seen these questions until five minutes ago when they were handed to me by the prosecution.

The Court: You know it's the same procedure we've gone through here a half dozen times.

It is the judgment——

Mr. Menin: I believe it can be——

The Court: Will you please be seated, Mr. Menin.

Mr. Menin: Save an exception to the Court's ruling.

The Court: It is the judgment of the Court that the witness is guilty of criminal contempt of court, and the Court so finds and remands her to the custody of the Marshal until tomorrow morning for sentence.

Mr. Menin: May we ask that bail be—

The Court: I won't fix any bail until tomorrow, ten o'clock tomorrow morning.

Filed January 5, 1949.

GOVERNMENT'S EXHIBIT "A".

In the Matter of the United States Grand Jury.

Before: The United States Grand Jury, United States Postoffice Building, Denver, Colorado, January 4, 1949, 10:00 o'clock, a. m.

Present: Mr. Max Bulkeley, United States District Attorney for the District of Colorado; Mr. Joseph N. Lilly, Assistant United States District Attorney for the District of Colorado.

Whereupon the following proceedings were had, to wit: [fol. 99] PATRICIA BELL BLAU, called as a witness herein, being first duly sworn by the Foreman of the Grand Jury, was examined and testified as follows:

Examination by Mr. Lilly.

Q. Will you state your name, please?

A. My name is Patricia Bell Blau.

Q. And you are also known as Pat Blau; is that correct?

A. Pat is a common abbreviation for Patricia.

Q. Yes, but are you known as Pat?

A. (No response.)

Q. Where do you live, Mrs. Blau?

A. I am living now at 2427 Tremont Place, Denver.

Q. Mrs. Blau, before we commence this inquiry I might tell you that you are not the subject of the investigation of this grand jury; you are simply being called here as a witness in connection with a matter that this grand jury has

under consideration, and I thought you should know that before we should proceed with the inquiry.

Mrs. Blau, do you know the names of the State officers of the Communist Party of Colorado?

A. Mr. Lilly, you state that I am not the subject of this investigation?

Q. Yes.

A. Do I have a right to know what is the purpose of this investigation?

Q. No, you don't. The grand jury does not have to tell you what the nature of the investigation is, Mrs. Blau. You are only here to answer such questions as are propounded. If you don't feel like you want to answer on some grounds, you may state those grounds and then we will have to meet the situation as we come to it; but it is not the duty of the grand jury to reveal to you the nature of the inquiry; but you are not the subject of the investigation.

A. You asked me the names of the officers?

Q. What State officers of the Communist Party of Colorado.

A. The names of some of the State officers of the Communist Party of Colorado I believe are already known to you because they have testified here.

Q. I am just asking you, Mrs. Blau.

A. Yes.

Q. We want to know what you know about it.

[fol. 100] A. Yes. Well, I would—I feel that I should not answer that question because since there are twelve leaders of the Communist Party at present under indictment under the Smith Act in New York City by the Department of Justice, any evidence which I may give or any testimony which I may give which associates myself with any leaders of the Communist Party will therefore incriminate myself, and I therefore feel that I should not answer that question on the grounds that it may tend to incriminate me.

Q. You understand the question? The question isn't what your association with those persons is; it is whether or not you know the names of those persons. Do I make myself clear?

A. You mean the members of the State Committee of the Communist Party?

Q. If that's what you call it, yes.

A. Well, that would be the State leadership of the Communist Party.

Q. Yes.

A. Mr. Lilly, frankly, I have to say that if I sat down and thought about it I could remember all the names of the members of the State Committee of the Communist Party, but I do not feel that I should answer because that would directly associate me with an intimate knowledge of that State Committee.

Q. You feel that it would incriminate you for the violation of a Federal offense?

A. The Smith Act, yes.

Q. Is that the reason you do not desire to answer the question?

A. That is the reason I do not desire to answer the question.

Q. All right. Do you know whether or not the Communist Party of Colorado has a table of organization?

A. The Communist Party of the United States has a Constitution by which the Communist Party of Colorado, of course, is organized.

Q. Do you know what the organization of the Communist Party of Colorado is, the table of organization of the Communist Party of Colorado?

A. Well, wouldn't that be implying exactly the same intimate knowledge and association with the Communist Party? It isn't anything that I have any reason to refuse to reveal; it's a very common structure, but I think that my [fol. 101] stating that I knew exactly how the Communist Party was organized would tend, or would constitute an admission of an intimate association.

Q. You feel that it might tend to incriminate you for the violation of a Federal offense?

A. Under the Smith Act.

Q. Are you employed now, Mrs. Blau?

A. No, I am not now employed. I am living off my husband.

Q. Were you ever employed by the Communist Party of Colorado?

A. I worked for the Communist——

Q. You want the reporter to strike that out?

A. Would you strike that, please?

Q. We are not trying to trick you into anything here, Mrs. Blau. We are just asking questions.

A. No; I realize that. My political activities have been on a voluntary basis.

Q. Well, that's not an answer to my question. Will you repeat the question?

A. Well, whatever political activities I have been engaged in, I have not been on a salary basis; it has been on a voluntary basis—sometimes a payment of expenses.

Q. Do I take it by that answer that you have performed services for the Communist Party of Colorado?

A. Mr. Lilly, you get me in exactly the same spot.

Q. I'm not trying to put you in a spot; I am just trying to see what answer you want to give to these questions. If you don't want to answer, that is up to you to say.

A. My political activities and beliefs are a matter of public knowledge, of public record. I am proud of them, but I feel that at this moment saying directly that I have been employed by any party is a violation of my rights under the first amendment, which says that no one is answerable to anyone for his political beliefs or associations or views.

Q. Even though your activities have been a matter of public record, as you say, you refuse to answer on the grounds that it might incriminate you for the violation of a Federal offense?

A. That, and also the asking of the question is a violation [fol. 102] of my rights under the first Article of the Bill of Rights which guarantees that no person shall have to answer for his political or religious views.

Q. Mrs. Blau, did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?

A. I shall have to answer that the same, that as long as the twelve leaders of the Communist Party are under indictment by the Department of Justice, as long as that indictment stands, I would be associated myself with the conspiracy with which they are charged.

Q. Then you desire to give the same answer for the same reason?

A. I desire to give the same answer for the same reason.

Q. Do you now have in your possession any books and records of the Communist Party of Colorado?

A. No.

Q. Did you turn the books and records of the Communist Party of Colorado over to any particular person?

A. I shall have to decline to answer that for the same reason, that it may tend to incriminate me, and also under the President's loyalty order declaring the Communist

Party to be an agent of a foreign power, which I do not believe, but as long as the President's loyalty order is in force in this country I have to accept that.

Q. Do you know the names of any persons who might now have the books and records of the Communist Party of Colorado?

A. I shall have to answer that in the same manner, that I can't answer it because it would tend to incriminate me under the Smith Act.

Q. Could you describe to the grand jury any books and records of the Communist Party of Colorado?

A. I cannot actually, because the knowledge of the books and records of the Communist Party would tend to incriminate me of a Federal offense under the Smith Act.

Q. Well, all right; I think we will excuse you. If you will step out in the hall, please, you may go this morning, but I think you had better plan to be back here about 1:30.

A. 1:30 this afternoon?

Mr. Lilly: Yes, and will you tell Mr. Menin that he [fol. 103] might be here with you too? You might desire the assistance of counsel.

(Witness excused.)

Filed January 4, 1949.

Defendant's Exhibit 1

In the District Court of the United States for the Southern District of New York. United States of America v. Jacob Stachel. No. c-128-91.

The Grand Jury charges:

1. That from on or about July 26, 1945, and continuously thereafter up to and including the date of the filing of this indictment, the Communist Party of the United States of America has been a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence.

2. That from on or about July 26, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Jacob Stachel, the defendant herein, has been a member of said Communist Party of the United States of America, the defendant well knowing during all said period that said Com-

munist Party of the United States of America was and is a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence.

In violation of Sections 10 and 13, Title 18, United States Code.

A true bill.

Jerome S. Blumauer, Acting Foreman. John F. X. McGohey, United States Attorney. (Seal.)

A true copy.

William V. Connell, Clerk.

[fol. 104] DEFENDANT'S EXHIBIT 2

One Conspiracy Indictment

In the District Court of the United States for the Southern District of New York. United States of America v. William Z. Foster, Eugene Dennis, also known as Francis X. Waldron, Jr., John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, also known as Israel Regenstreif, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, also known as Arno Gust Halberg. No. c-128-87.

The Grand Jury charges:

1. That from on or about April 1, 1945, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, William Z. Foster, Eugene Dennis, also known as Francis X. Waldron, Jr., John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, also known as Israel Regenstreif, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, also known as Arno Gust Halberg, the defendants herein, unlawfully, wilfully and knowingly, did conspire with each other, and with divers other persons to the Grand Jurors unknown, to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by

force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence, which said acts are prohibited by Section 2 of the Act of June 28, 1940 (Section 10, Title 18, United States Code), commonly known as the Smith Act.

2. It was part of said conspiracy that said defendants would convene, in the Southern District of New York, a meeting of the National Board of the Communist Political Association, and for the purpose of organizing as the Communist Party of the United States of America, a society, group, and assembly of persons dedicated to the Marxist-Leninist principles of the overthrow and destruction of the Government of the United States by force and violence.

3. It was further a part of said conspiracy that said defendants would thereafter convene, in the Southern District of New York, a meeting of the National Committee of the Communist Political Association on or about June 18, 1945, to amend and adopt said draft resolution.

4. It was further a part of said conspiracy that said defendants would thereafter cause to be convened, in the Southern District of New York, a special National Convention of the Communist Political Association on or about July 26, 1945, for the purpose of considering and acting upon said resolution as amended.

5. It was further a part of said conspiracy that said defendants would induce the delegates to said National Convention to dissolve the Communist Political Association.

6. It was further a part of said conspiracy that said defendants would bring about the organization of the Communist Party of the United States of America as a society, group, and assembly of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and would cause said Convention to adopt a Constitution basing said Party upon the principles of Marxism-Leninism.

7. It was further a part of said conspiracy that said defendants would bring about the election of officers and the election of a National Committee of said Party, and would become members of said Party, and be elected as officers

and as members of said National Committee and the National Board of said Committee, and in such capacities said defendants would assume leadership of said Party and responsibility for its policies and activities, and would meet from time to time to formulate, supervise, and carry out the policies and activities of said Party.

8. It was further a part of said conspiracy that said defendants would cause to be organized Clubs, and District and State units of said Party, and would recruit and encourage the recruitment of members of said Party.

9. It was further a part of said conspiracy that said defendants would publish and circulate, and cause to be published and circulated, books, articles, magazines, and newspapers advocating the principles of Marxism-Leninism.

10. It was further a part of said conspiracy that said defendants would conduct, and cause to be conducted, schools and classes for the study of the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.

In violation of Sections 3 and 5 of the Act of June 28, 1940 (Sections 11 and 13, Title 18, United States Code), commonly known as the Smith Act.

IN UNITED STATES DISTRICT COURT

ORDER REMANDING PATRICIA BLAU TO THE CUSTODY OF THE UNITED STATES MARSHAL.—Filed January 4, 1949

This matter coming on for hearing in open court, the United States of America appearing by Max N. Bulkeley, United States Attorney, and Joseph N. Lilly, Assistant United States Attorney, and the defendant Patricia Blau appearing in her own proper person and by Samuel D. Menin, her attorney, and it was called to the attention of the court that the defendant Patricia Blau was summoned and appeared as a witness before the duly empanelled grand jury of this court, and refused to answer questions propounded to her and was then brought before this court,

It is now determined that the questions propounded to the said Patricia Blau, a witness before the grand jury now in session, were proper questions, and the court having ordered the said Patricia Blau to answer the said questions and the said Patricia Blau having refused to do so in open court, in disobedience to the lawful order of this court, and the court finds that the said Patricia Blau has committed criminal contempt of the court, and

It is ordered that the defendant Patricia Blau be committed to the custody of the United States Marshal for the District of Colorado, to be retained by him and brought before this court at 10:00 o'clock in the forenoon of January 5, 1949, for sentence.

Dated at Denver, Colorado, this 4th day of January, 1949.

By the Court.

J. Foster Symes, United States District Judge.

[fol. 105] In United States District Court

In the matter of imposition of sentence of Patricia Bell Blau.

Before: The Honorable J. Foster Symes, U. S. District Judge.

Denver, Colorado, January 5, 1949.

Appearances: For the Government: Mr. Joseph N. Lilly, Assistant U. S. District Attorney; for the Defendant: Mr. Samuel D. Menin, Attorney at Law, and the defendant in person.

Mr. Lilly: Your Honor please, the Government desires to move the imposition of sentence in the matter of Patricia Blau. Come up, please.

It is desired that this matter be treated as a matter of criminal contempt and a definite punishment be fixed.

The Court: That is the way the Court treated it.

Mr. Lilly: Yes.

The Court: Is there anything to be said by the prisoner?

The Defendant: Yes, Your Honor, I would like to make a statement before you pass sentence.

The Court: All right.

The Defendant: I would like to say that I repeated several times yesterday that I stand on my constitutional rights not to have to answer the questions that were propounded to me in the grand jury room. I based my refusal to answer on the fact that the men who wrote the Bill of Rights did so out of direct and very bitter experience with rulers who had persecuted them because of their religious and political beliefs; they wished to safeguard for all time the right of any person in the United States to believe as he thinks best and to organize with other people to express his beliefs.

Yet today there are twelve men in New York under indictment by the Department of Justice facing ten years in jail and a ten thousand dollar fine for no other reason than [fol. 196] that they "wilfully and knowingly did conspire with each other and with divers other persons to the grand jurors unknown to organize as the Communist Party of the United States."

The men who wrote the Bill of Rights wished further to safeguard the right of any person to refuse to answer questions which might endanger himself. The fifth amendment says clearly "no person shall be compelled in any criminal case to be a witness against himself," and yet this Court has already sentenced six Denver people and today is sentencing myself for upholding this constitutional right.

I say that the reason that the rights of the Communist Party and of other citizens who are raising their voices against the policy of the administration are being attacked today is because the Communist Party, among other organizations, has constantly raised its voice for a foreign policy which will bring about a just and lasting peace, and against the policy which we believe is going to bring us into a new and more horrible war; for the rights of labor, for the abolition of lynching in the South, and that we have been pointing out to the American people that the course the administration is following can only lead to depression, to war, and to misery for the great majority of the American people, and this proceeding is part of the effort to stifle the voice of the Communist Party; to persecute and victimize those who raise a voice in opposition to its policies.

This attack, I feel, is a dangerous step toward the imposition of Fascism, the suppression of all free expression of

opinion, and it is shaking the very foundations of our democracy.

I will give my life to uphold the Bill of Rights and defend the inalienable rights of all people.

I would like to conclude by quoting Mr. Justice Robert H. Jackson when he said:

"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory uni- [fol. 107] fication of opinion achieves only the unanimity of the graveyard. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

I thank you for the privilege of making this statement.

Mr. Lilly: May the record show, Your Honor please, that the witness read from a prepared written statement.

The Defendant: Prepared in the county jail.

The Court: Have you anything to say?

Mr. Menin: I have only this to say: In the defense of this matter yesterday as counsel for this witness and for this defendant it is extremely difficult for counsel to properly advise when the Department of Justice follows the two-faced policy which it has been following—that of bringing indictments against people because of a political belief in New York City and then coming into court here and saying that the political belief for which they have indicted people in New York doesn't amount to a crime here.

I submit that in the administration of Justice the obligation of a defense counsel is to advise his client upon the possibilities which exist, both here and in another part of these same United States.

Now, if the Government can follow a policy of indicting people in New York, certainly it appears to counsel that to question witnesses regarding the very matters for which other people are indicted, that those people who are being questioned have every right in the world to seek the protection of the Constitution and refuse to answer the questions on the ground that they may tend to incriminate them.

I further submit that under the first amendment if, as the Government in its two-faced policy now says, it is not here a crime to be a member of the Communist Party—under

that policy if it is not a crime, then the Government has no [fol. 108] right under the first amendment of the Constitution to inquire into the political beliefs of any individual.

I submit to the Court that if we are to go on—and I trust that this country will go on as the great nation that it is—it is as much up to the Court to uphold the constitutional provisions as it is up to these defendants, and I think the Court must be especially diligent in these times of hysteria.

The Court: This Court is not acting on its own initiative in this matter. It is a rather unpleasant duty it has to perform. But the Constitution provides for the Federal Courts, and the judges thereof must perform their duty as they see it and as the law of the land prescribes.

Now, this woman, like so many of these others, is attempting to pose as a martyr for the Communist Party. The Communist Party is not being prosecuted or investigated by the grand jury. These defendants don't realize that the constitutional immunity which they claim under the Federal Constitution is purely personal and applies only to themselves personally and they cannot refuse to answer questions for the grand jury simply because they may incriminate some third party. Third parties cannot take advantage of that right and have witnesses who are called protect them by refusing to answer questions.

Now, this lady has caused the Court a good deal of trouble. We had a subpoena out for her for a long while and she defied that. She evidently knew, I'm quite sure she knew that she was wanted here, and yet she avoided service by the United States Marshal for some time until they finally caught her downstairs in the corridor of this building and served a subpoena on her.

Mr. Menin: May I say in regard to that——

The Court: Furthermore, she hasn't been asked, and as we went over this record yesterday there wasn't a single question in there which asked her, if she was a member of the Communist Party. I have advised her and I advised [fol. 109] you and made the announcement that it is no crime to be a member of the Communist Party.

Furthermore, you seem to rely on this New York proceeding. That is a proceeding in an entirely different jurisdiction; there has been no trial or final decision of the issues involved there, and simply because someone is wrongly ac-

cused in another district of the United States is no precedent in this Court for this Court to alter its views or its action in the matter. Those people in New York were indicted simply for entering into a conspiracy to overthrow the Government of the United States by force and violence. Now, nothing could be more despicable than that, and I don't believe this woman, in view of what she said here, has any desire to overthrow the Government of the United States by force or violence. But whether she does or not is not an issue here.

Now, judicial process requires that witnesses, when called before a grand jury or in this court for the trial of an action, must answer questions. As I have often observed, if we can not compel witnesses to testify in this Court we might as well close up all courts, because our procedure and everything depend on testimony of witnesses who take the stand and are asked questions whether they know about a certain crime or a certain matter that is under inquiry by the Court.

All these people you represent and this lady here simply say, in effect, "I've got the right to say whether or not I shall testify in the Federal Court in regard to a matter that I have knowledge of." If you just think of that a minute it's so ridiculous I don't see how anybody can propound it here with a straight face. For instance, if we were trying a murder case here where some man had murdered a little child, or a woman had been raped, or something like that, and somebody was a witness and came in here and said, "I don't care to testify in this matter because the Constitution says I don't have to," you can see that we couldn't enforce the laws of the country and punish offenders, and [fol. 110] these people who are defying the Court here in this proceeding might be the first to object to someone who might commit a crime against them or some member of their family and they would want them prosecuted.

If we can't call witnesses in here and compel them to tell their story so that we can convict law violators we might as well set the Constitution and everything else aside and start all over again.

I haven't much sympathy for this lady because, as I said, she defied the Court by avoiding the process of the Court when she knew very well that she was wanted here, and yet

she hid out, apparently so that the process of this court could not be served upon her.

Mr. Menin: May I direct the Court's attention——

The Court: It is the judgment and sentence of the Court that she serve one year for this criminal contempt, in the custody of the Attorney General, and I will admit her to bail in the sum of twenty-five hundred dollars, pending appeal. If she doesn't appeal, the bond will be revoked.

Mr. Menin: May I, for the purpose of the record——

The Court: Say anything you want, and hurry up.

Mr. Menin:—point out that this woman did not defy any subpoena issued by this Court. This woman was ill and was away and was not aware of the proceedings that were pending here. She had communicated with her husband but he did not communicate to her that she was wanted. When she came back to Denver she went to the postoffice to get some mail and it was then that she was served with the subpoena, and she immediately accepted it. I think for the Court to assume something that did not exist and upon which there is no evidence is entirely improper.

And I want further to point out——

[fol. 111] The Court: That is your opinion, Mr. Menin. I don't care to hear from you any further on that.

The Defendant: I left Denver eleven days before the grand jury came into session.

The Court: I beg your pardon?

The Defendant: I left Denver eleven days before the grand jury came into session and I had no knowledge that the grand jury was going to sit or that it was going to require my presence as a witness or in any other manner.

The Court: Your name was mentioned here quite often. I don't care to discuss that. That is not the basis of my judgment in the matter. That's all.

Filed January 6, 1949.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT.

On this 5th day of January, A. D. 1949, came the Attorney for the Government, and the defendant appeared in person, and by her counsel, Samuel D. Menin, and

It Is Adjudged that the Defendant, Patricia Blau, having been convicted of criminal contempt of this Court for disobedience of a lawful Order of this Court, in that the defendant, Patricia Blau did, in open Court, refuse to answer certain questions propounded to her as a witness at the present session of the duly impaneled grand jury, which questions the Court found to be proper, and did order the defendant, Patricia Blau, to answer, and the Court, having asked the defendant, Patricia Blau, whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant, Patricia Blau, is hereby committed to the custody of the Attorney General or his authorized representative, for imprisonment for a [fol. 112] period of one year from and after this 5th day of January, A. D. 1949.

It Is Ordered That the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer and that the copy served as the commitment of the defendant.

J. Foster Symes, District Judge.

EEN/u

Filed and entered on the docket January 5, 1949.

In United States District Court

Notice of Appeal—Filed January 5, 1949.

Name and address of appellant: Patricia Blau, 2427 Tremont Place, Denver, Colorado.

Name and address of appellant's attorney: Samuel D. Menin, 614 E. & C. Building, Denver, Colorado.

Offense: Contempt of Court.

Concise statement of judgment or order: Court ordered appellant to be in the custody of the United States Attorney General to be confined in a place designated by him for a period of one year from and after the 5th day of January, 1949.

The above-named appellant, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated January 5, 1949.

SAMUEL D. MENIN,
Attorney for the Appellant.

Received a copy this 5th day of January, A. D. 1948, at the hour of 3:30 P. M.

JOSEPH N. LILLY,
Asst. United States Attorney.

[fol. 113] IN UNITED STATES DISTRICT COURT

ORDER GRANTING BAIL TO DEFENDANT PENDING APPEAL

The District Attorney appears for the United States, and the defendant appears in her own proper person and by Samuel D. Menin, her attorney.

And thereupon, it is ordered by the Court that the defendant be let to bail in the sum of Twenty-five Hundred Dollars ($2500.00), pending her appeal to the United States Court of Appeals for the Tenth Judicial Circuit.

It is further ordered by the Court that if no appeal is taken, the right to bail will be cancelled.

Entered on the Docket January 5, 1949.

(Appeal bond in the sum of $2500.00 on the form prescribed by the Court of Appeals filed on January 19, 1949.)

IN UNITED STATES DISTRICT COURT

STATEMENT OF DOCKET ENTRIES.

1. Order empanelling Grand Jury—Session commences	Sept.	20, 1948
2. Order: Recessing Grand Jury until further notice	Oct.	11, 1948
3. Order: Recalling grand jurors for further service on Jan. 4, 1949	Dec.	1, 1948
4. Grand Jury reports for further service	Jan.	4, 1949
5. Hearing had in open court	Jan.	4, 1949

6. Order: Remanding Patricia Blau to the custody of the U. S. Marshal (sgd)—2 copies delivered to U. S. Marshal ..... Jan. 4, 1949
7. Order: Judgment and commitment for a Period of one year (2 copies to U. S. Marshal). (sgd) ..... Jan. 5, 1949
8. Order: Defendant be released on furnishing bail bond in the sum of $2500.00, pending appeal ..... Jan. 5, 1949

[fol. 114] 9. Certificate (sgd) of The Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado ..... Jan. 5, 1949
10. Reporter's Transcript of Record of Hearing on Jan. 4, 1949 ..... Jan. 5, 1949
11. Notice of Appeal ..... Jan. 5, 1949
12. Order: Grand Jury excused until further notice ..... Jan. 5, 1949

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 115] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RECORD ENTRY: CAUSES ARGUED AND SUBMITTED.

Seventy-second Day, November Term, Thursday, March 31st, A. D. 1949. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard and were argued by counsel, Samuel D. Menin, Esquire, appearing for appellants, M. H. Goldschein, Esquire, appearing for appellee.

Thereupon these causes were submitted to the court.

Samuel D. Menin for Appellants. M. H. Goldschein (Max M. Bufkeley, United States Attorney; Joseph N. Lilly, Assistant United States Attorney, were with him on the brief) for Appellee.

Before Bratton, Huxman and Murrah, United States Circuit Judges.

IN UNITED STATES COURT OF APPEALS

OPINION—January 31, 1950

HUXMAN, Circuit Judge:

The appellants in these two cases, together with the appellants in cases numbered 3768, 3769, 3770, 3782, and 3783, decided by our Court January 5, 1950, were called as witnesses before a grand jury regularly convened for the United States District Court for the District of Colorado. They were also asked certain questions with respect to their membership in the Communist Party, their knowledge of its membership, of its officers, its books and records, etc. The questions were in the main identical with those set out in detail in the above cited cases. They both refused to answer on the ground that their answers might tend to incriminate them. These cases are like that of Nancy Wertheimer v. United States, supra, in that appellants refused [fol. 116] to answer any question showing membership in connection with, or knowledge of activities of the Communist Party of Colorado. A formal presentment was filed against Tracy Roy Rogers before the District Court. No formal presentment was filed in the case of Patricia Blau. Specific questions were propounded to them in the presence of the District Court, and they were directed by the court to answer them. They based their refusal to do so on the ground that their answers might tend to incriminate them. Continuing to refuse to answer, they were found guilty of contempt and sentence was imposed upon them. These appeals challenge the correctness of those judgments.

In Jane Rogers, et al. v. United States, supra, we reviewed the authorities at length which controlled the disposition of these appeals. In the interest of brevity, we will not repeat what was said there, but incorporate by reference the applicable principles set out in that opinion.

In Number 3826, Tracy Roy Rogers v. United States, the presentment of the grand jury stated that the grand jury undertook an inquiry concerning various employees of the United States Government who had allegedly made false statements in connection with their loyalty investigation, in violation of Section 80, Title 18 U.S.C.A., and other criminal laws of the United States.

In the case of Patricia Blau, no formal presentment was lodged.

As in the other cases, for the purpose of passing upon the rights of those appellants to refuse to answer the question propounded to them, the subject of investigation as stated in the presentment in the case of Tracy Roy Rogers will be accepted as the object of the grand jury's investigation.

In Number 3769, Nancy Wertheimer v. United States, we held that within the scope of the grand jury investigation and within the posture of the case before the trial court on the citation for contempt, her refusal to answer concerning her connection with the Communist Party on the ground that [fol. 117] her answer might incriminate her was warranted, and that she was not required to give any answer or explanation why her answer might tend to incriminate her. But here, Patricia Blau and Tracy Roy Rogers both gave their reasons for refusing to answer the questions propounded to them. Thus Tracy Rogers, in response to the court's inquiry whether he desired to answer the question, stated:

> "I do not, sir. I decline to answer that question on the grounds that it would tend to incriminate me in view of the indictments under which the twelve national leaders of the Communist Party are being prosecuted and where one of the indictments holds that to be a member of the Communist Party is a crime."

And,

> "While I agree that it is not a crime to be a member of the Communist Party, nevertheless people are being prosecuted for such, and the outcome of this case may well have a bearing on the testimony that I give before this Court."

Patricia Blau, in response to the same inquiry by the court, stated:

> "My answer, in substance, was that since there are twelve national leaders of the Communist Party under indictment at this moment by the Department of Justice in the Southern District of New York, I believe that my expressing knowledge, intimate knowledge, of the Communist Party in this state would tend to incriminate me under the Smith Act, because the Smith Act specifically says that they wilfully and knowingly did conspire with each other and with divers other persons to the grand jurors unknown, and that my answer-

ing a question which would associate myself with the leadership of the Communist Party would tend to incriminate me under the Smith Act."

[fol. 118] And, again she stated:

"Yes, I persist in the answer, that my sole answering a question as to show that I have intimate knowledge of the structure of the Communist Party, at a time when Attorney General Clark has declared the Communist Party to be a subversive organization, with Truman's loyalty order, has declared it to be an agent of a foreign power, expressions with which I disagree—however, they are the law of the land at the moment—and I therefore feel that I must uphold my constitutional right not to have to answer these questions."

The status of the Communist Party of the United States is somewhat shrouded with uncertainty and confusion. There have been expressions of numerous ones holding high official positions that the Communist Party is dedicated to the forcible overthrow of the Government and is, therefore, an unlawful organization. However, the decisions of the courts presently are to the effect that membership in the Party is not of itself an offense.[1]

These appellants did not base their refusal to answer the questions on the grounds that their answers might tend to incriminate them within the scope of the grand jury investigation. Rather they based it upon the ground that admitting their membership in, or connection with, the Communist Party constituted a criminal offense and subjected them to criminal prosecution. In this, they were wrong and they were therefore not warranted in refusing to answer.

The judgments in both Number 3826—Tracy Roy Rogers v. United States of America, and Number 3846—Patricia Blau v. United States of America, are severally affirmed.

Judge Bratton concurs in the result.

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[1] Schneiderman v. United States, 320 U. S. 118; Dunne v. United States, 138 Fed. (2d) 137.

[fol. 119] IN UNITED STATES COURT OF APPEALS

JUDGMENT

Fiftieth Day, November Term, Tuesday, January 31st, 1950. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Patricia Blau, appellant, surrender herself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon her, within ten days from and after the date of the filing of the mandate of this court in said district court.

[fol. 120] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 121] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 15, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. 635

JANE ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 636

IRVING BLAU, PETITIONER

v.

UNITED STATES OF AMERICA

No. 637

ARTHUR BARY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 638

PAUL MEIR KLEINBORD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 639

TRACY ROY ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 640

PATRICIA BLAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. 635

JANE ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 636

IRVING BLAU, PETITIONER

v.

UNITED STATES OF AMERICA

No. 637

ARTHUR BARY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 638

PAUL MEIR KLEINBORD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 639

TRACY ROY ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 640

PATRICIA BLAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals in Nos. 635, 636, 637, and 638 (R. 297-306)[1] is reported at 179

[1] The records in these six cases are contained in two volumes. One volume contains the proceedings in Nos. 635, 636, 637,

F. 2d 559. The opinion of the Court of Appeals in Nos. 639 and 640 (2R. 115-118) is reported at 180 F. 2d 103.

JURISDICTION

The judgments of the Court of Appeals in Nos. 635, 636, 637, and 638 were entered on January 5, 1950 (R. 306-308), and a petition for rehearing in those cases (R. 308-321) was denied on January 28, 1950 (R. 322). The judgments of the Court of Appeals in Nos. 639 and 640 were entered on January 31, 1950 (2R. 119). The petition for writs of certiorari was filed on February 27, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.[2]

QUESTIONS PRESENTED

Three of these cases (Nos. 637, 638, and 639) are now moot, as explained at pp. 5-6, *infra*. The questions presented by the remaining cases are as follows:

1. Whether a witness before a grand jury is privileged, by virtue of the Fifth Amendment's guaranty against compulsory self-incrimination, to refuse to disclose whether he is a member of or affiliated with the Communist Party.

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and 638; the other volume, the proceedings in Nos. 639 and 640. We shall refer herein to the former by the designation "R.," and to the latter by the designation "2R."

[2] Three of these cases (Nos. 635, 636, and 640) are criminal in nature, and three (Nos. 637, 638, and 639) are civil in nature. See *infra*, pp. 5, 6.

2. Whether the marital privilege authorizes a husband to refuse to disclose his wife's address.

3. Whether a witness who voluntarily admits that she is a member of the Communist Party, that she was a treasurer of the state branch of the Party up to a short time prior to testifying, and that she had custody of the Party's membership records in her capacity as treasurer, may lawfully refuse to disclose the identity of the person to whom she turned the records over on ceasing to be treasurer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Sections 2, 3, and 5 of the Act of June 28, 1940, c. 439, 54 Stat. 670, 671, commonly known as the Smith Act, provided in pertinent part as follows:[3]

> Sec. 2 [18 U. S. C. (1946 ed.) 10]. (a) It shall be unlawful for any person—
>
> * * * * *
>
> (3) to organize or help to organize any society, group, or assembly of persons who teach,

[3] These sections are now consolidated, with merely phrasecological changes, as 18 U.S.C. 2385, except that the conspiracy clause of Section 3 is "omitted [from § 2385] as covered by the general conspiracy provision [§ 371]." See Reviser's note.

advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

Sec. 3 [18 U. S. C. (1946 ed.) 11]. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

* * * * *

Sec. 5 [18 U. S. C. (1946 ed.) 13]. (a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both.

* * * * *

STATEMENT

The petition for writs of certiorari seeks review of six judgments of the Court of Appeals for the Tenth Circuit (R. 306-308; 2R. 119) affirming judgments of the District Court for the District of Colorado (R. 7-8, 27, 96-97, 103-104; 2R. 66-67, 111-112) finding petitioners in contempt of

court[4] for refusing to answer questions, propounded to them before a duly constituted grand jury, relating generally to their membership in, affiliation with, and knowledge of the activities and records of, the Communist Party of the State of Colorado. The petitioners' refusals to answer were, in general, based on claims that their answers would tend to be self-incriminating, and hence privileged under the Fifth Amendment.

Three of the judgments—those appertaining to Arthur Bary, Paul Meir Kleinbord, and Tracy Roy Rogers—were for civil contempt (see R. 85; 2R. 3); no fines were imposed on these three petitioners; each was ordered "committed to the custody of the United States Marshal * * * until such time as the defendant purges himself of said contempt or until the further order of the Court" (R. 96, 104; 2R. 67). The grand jury before which the contempts took place was empanelled on September 20, 1948 (R. 85-86; 2R. 3). Its 18-month maximum legal term (see Rule 6(g), F. R. Crim. P.) ended, therefore, on March 20, 1950. It was formally discharged by an order entered April 11, 1950, a copy of which has been supplied us by the United States Attorney. It is thus no longer possible for these three petitioners, even if they were desirous of doing so, to "purge" themselves by going before the grand jury and answering the questions they had previously refused to answer.

[4] See 18 U.S.C. [1948 rev.] 401, 402.

See *Marshall* v. *Gordon*, 243 U. S. 521, 542; *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *Securities and Exchange Commission* v. *Penfield Co.*, 157 F. 2d 65, 67 (C. A. 9), affirmed, 330 U. S. 585; *Parker* v. *United States*, 153 F. 2d 66, 70 (C. A. 1); *Loubriel* v. *United States*, 9 F. 2d 807, 809 (C. A. 2); *United States* v. *Collins*, 146 Fed. 553, 554 (D. Ore.). Their bail bonds have been cancelled, according to advice received from the United States Attorney, so that their present liberty is unconditional. Consequently, these three cases are clearly moot.

The other three judgments—those relating to Jane Rogers, Irving Blau, and Patricia Blau—were for criminal contempt (see R. 5; 2R. 72); these three petitioners were sentenced to definite terms of imprisonment of four months (R. 7-8), six months (R. 27), and one year (2R. 111-112), respectively. The evidence on which their convictions were based may be summarized as follows:

On September 20, 1949 (R. 5-6; 2R 3, 72), a grand jury was duly empanelled in the District of Colorado for the purpose of undertaking "an inquiry concerning various employees of the United States Government who had allegedly made false statements in connection with their loyalty investigation in violation of Section 80, Title 18 U. S. C. [1946 ed.] and other criminal laws of the United States" (R. 86, 98; 2R. 4). According to formal presentments (R. 86-89, 97-100; 2R. 4-6) filed against the three civil defendants (Bary, Klein-

bord, and Tracy Roy Rogers, see *supra*),[5] "[i]n pursuing such inquiry it became necessary for said Grand Jury to inquire into and ascertain the following: The names of the officers of the Communist Party of Colorado; the identity of persons in charge of the books and records of the Communist Party of Colorado, showing or pertaining to the membership of the Communist Party of Colorado" (R. 86, 98; 2R. 4).

Jane Rogers.—Jane Rogers appeared before the grand jury on September 20 or 21, 1948. In reply to questions propounded to her, she stated that she had been treasurer of the Communist Party of Denver for several years prior to January 1948; that up to that time, in her capacity as treasurer, she had in her possession the books and records of the Party showing the membership therein and the dues paid; but that she did not have those books and records in her possession as of the time of her testifying. (R. 11.) She also "testified to a great many other matters before the Grand Jury that were pertinent to the issue" (*ibid.*). She refused, however, to state to whom she had turned over the books and records when she ceased to be treasurer in January 1948 (R. 11, 12).[6]

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[5] No formal presentments were filed against the three criminal defendants; the proceedings against them were instituted informally. See R. 298; 2R. 116; Rule 42, F. R. Crim. P.

[6] The record does not contain the transcript of Jane Rogers' testimony before the grand jury, and it does not clearly indicate on what ground she refused to disclose to the grand

Thereafter, on September 21, 1948, the refusal of Jane Rogers to disclose to the grand jury the identity of the person to whom she had surrendered the books and records was brought to the attention of District Judge Symes in open court (R. 9-10, 11-12). Judge Symes asked her whether she was then willing "to answer that question," and she replied in the negative (R. 12). When asked why she would not answer, she replied, "I don't feel that I should subject a person or persons to the same thing that I'm going through" (*ibid.*). Judge Symes directed her to answer the question (*ibid.*), and, when she indicated that she would not answer, she was committed to the custody of the marshal until further hearing on the following morning, "[i]n order that [she] might have an opportunity to reflect upon the matter and to consult with counsel" (R. 10, 12-13; see R. 6).

On the following day, September 22, 1948, counsel for Jane Rogers informed Judge Symes in open court that she "would purge herself of her contempt by answering the questions" (R. 10, 13). Judge Symes thereupon ordered that she be returned to the grand jury and, upon purging herself, be discharged from custody (*ibid.*). However, on the following day, September 23, Judge Symes was advised in open court that Jane Rogers "had

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jury the identity of the person to whom she surrendered the books and records in question. See, however, her reply to Judge Symes, at the hearing in open court on September 21, 1948 (referred to immediately hereinafter), when he asked her why she would not answer this question.

again been brought before the Grand Jury, would answer only one question and refused to answer all others" (R. 10, 13-14).[7] In reply to a question by Judge Symes as to whether she "still persist[ed] in not answering these questions," she stated that she understood that she had "a right to refuse to answer these questions, on the basis that they would tend to incriminate me, and * * * that I have the right to decide that" (R. 14). This appears to be her first reference to the privilege against compulsory self-incrimination. She was thereupon sentenced to imprisonment for four months (R. 14, 7-8).

Irving Blau.—Irving Blau appeared before the grand jury on September 21 and 22, 1948 (R. 50-57). Invoking the privilege against compulsory self-incrimination, he refused to answer all questions calculated to ascertain whether and to what extent he had "any official connection with the Communist Party" (R. 53-54).[8] In addition, he

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[7] The record is not more explicit as to the nature of the questions propounded to the witness at her second appearance before the grand jury, or as to the nature of the one question which she answered at that time.

[8] The Court of Appeals remarked in its opinion that "A perusal of his [Irving Blau's] entire examination before the grand jury indicates that it was established by his testimony or his answers that he was a member of the Communist Party" (R. 303), and that he, among others, "without objection, answered at least one question showing [his] connection with the Communist Party * * *" (R. 305). However, after carefully examining the transcript of Blau's testimony before the grand jury in so far as it is contained in the present record (see R. 53-58), we are constrained to agree with the assertion in the petition for certiorari (Pet. 19) that the above-quoted

refused to disclose to the grand jury where his wife, Patricia Blau, then was, on the ground that his knowledge of her whereabouts was based on a "privileged communication" between spouses (R. 55-58).[9] On September 23, 1948, Blau's refusal to answer questions was brought to Judge Symes' attention in open court (R. 50-58). It appearing that he did not desire to reconsider his refusals, and following argument by counsel (R. 58-74), he was sentenced to imprisonment for six months (R. 75, 27).

Patricia Blau—Patricia Blau appeared before the grand jury on January 4, 1949 (2R. 98). On the ground that her answers would tend to incriminate her under the Smith Act, supra, pp. 3-4,[10] she

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statements of the Court of Appeals are not supported by the record. Blau did not admit membership in or connection with the Party, nor is such membership or connection fairly inferable from anything he said before the grand jury (except in so far as his claim of privilege might be thought to give rise to such an inference).

[9] The government attorney explained to Blau that the grand jury desired to call his wife as a witness, but could not do so because they did not know where she could be served with a subpoena (R. 55). Blau admitted knowing where his wife was (R. 56), but exercised what he thought was his right not to reveal her location to the grand jury, since he knew that location in consequence of a "privileged communication," which he understood to mean "a communication between a man and his wife" (R. 55). He further elucidated his attitude in this respect by stating that he was sure his wife would have no objection to testifying if subpoenaed, but that how to subpoena her without knowledge of where to reach her was "[the Government's] problem" (R. 57-58).

[10] Specifically, she explained that her refusal to answer the questions asked was on the ground that her answers would tend to show intimate knowledge of the affairs of Com-

refused to state the names of the officers of the Communist Party of Colorado, the organizational setup of the Party, and whether she had ever been employed by the Party (2R. 99-102). She likewise refused, on the same ground, to describe any of the books and records of the Party, and to state whether she had ever had possession or custody of any such books and records, or whether she had ever turned them over to any other person (2R. 102). She was not directly asked whether she was a member of the Party (see 2R. 95, 100, 108).

Her refusal to answer these questions was brought to Judge Symes' attention in open court later in the same day (2R. 74-75). The transcript of her testimony before the grand jury was received in evidence (2R. 98-103), and she indicated that she did not desire to change any of her answers (2R. 79, 82-90). Copies of the indictments then pending in the Southern District of New York against the twelve national leaders of the Communist Party were received in evidence on her behalf (2R. 79-80, 103-104, 22-24), and Judge Symes heard argument of counsel on the question of whether the pendency of these indictments justified her refusal to reply to the above questions (2R. 80-82, 90-98). Judge Symes, after pointing out that Mrs. Blau was not asked whether she was

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munist Party, and association with the State leaders of the Party, at a time when twelve national leaders of the Party were under indictment in the Southern District of New York for violations of the Smith Act (2R. 100, 102).

a member of the Communist Party (2R. 95, 108), and that, even if she had been asked this question, she could not properly refuse to answer it because "it is no crime to be a member of the Communist Party" (2 R. 109), sentenced her to imprisonment for one year (2R. 110, 111-112).

ARGUMENT

The holding of the court below (2R. 118) that a witness could not refuse to answer questions as to membership in or connection with the Communist Party on grounds of self-incrimination is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Alexander* v. *United States,* February 4, 1950, not yet reported, a copy of which will be filed herewith. This conflict would seem to affect the sentence of only one of the six petitioners herein, Patricia Blau.

1. As already indicated (pp. 5-6, *supra*), the case is moot as to the petitioners Bary, Kleinbord and Tracy Roy Rogers.

2. Petitioner Jane Rogers freely admitted that she was a member of, and in fact a former treasurer of, the Communist Party of Colorado, and that she had had possession of the Party's membership records in her capacity as treasurer. Having volunteered this much, she was clearly bound to "go on and make a full disclosure." *Brown* v. *Walker,* 161 U. S. 591, 597. It was not a proper invocation of privilege to refuse to divulge the

identity of the person to whom she surrendered the books, and, in fact, it appears that her refusal in this respect was not predicated on the ground of privilege. She stated to Judge Symes that she declined to name the person in question owing to a desire to protect that person from the possible necessity of having to testify before the grand jury (*supra*, pp. 7-9). Such a reason, of course, has no sanction or justification in law.[11]

3. Petitioner Irving Blau consistently refused to answer all questions calculated to ascertain whether and to what extent he had "any official connection with the Communist Party".[12] But in addition he refused to answer questions as to the whereabouts of his wife on the ground that his knowledge of where she could be found was based on a "privileged" communication between spouses. See pp. 9-10, *supra*. The court below correctly held that the marital privilege does not extend to the location of the spouse; "it is difficult to imagine anything less private or confidential than the address of a husband or wife" (R. 305). See, gen-

[11] Even if the asserted ground of refusing to name the person to whom she delivered the books and records had been to protect that person from incrimination under the Smith Act, the reason would not have availed Mrs. Rogers. The Fifth Amendment's guaranty is intended as a shield against *self*-incrimination by the witness, not as a protection for others. *Brown* v. *Walker*, *supra*, 161 U.S. at 600.

[12] As pointed out in footnote 8, *supra*, pp. 9-10, we agree with Irving Blau that the record does not support the Court of Appeals' conclusion that he waived his privilege by volunteering some testimony showing his connection with the Party.

erally, 8 Wigmore, *Evidence* (3d ed.), §§ 2232, *et seq.*, and cases cited at R. 305. The finding of contempt as to Irving Blau was based upon his failure to answer the questions as to the whereabouts of his wife as well as about his connection with the Communist Party (R. 27, 29, 55-61). There is thus an adequate basis for sustaining the judgment of contempt against him without regard for the questions as to his connection with the Communist Party. The scope of the marital privilege does not seem to be a subject important enough for review by this Court in the absence of a conflict. Cf. *United States* v. *Walker*, 338 U. S. 891.

CONCLUSION

In view of the conflict with the Ninth Circuit, we do not oppose review of the judgment with respect to Patricia Blau. The petition for writs of certiorari should be denied as to Arthur Bary, Paul Meir Kleinbord, and Tracy Roy Rogers on the ground that those petitioners' cases are moot.

The petition with respect to Jane Rogers and Irving Blau should be denied both because the judgments below with respect to them are correct and because with respect to them no questions worthy of review by this Court need be determined.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1950.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1950

No. [redacted] 20, 21-22

JANE ROGERS, *Petitioner,*

vs.

UNITED STATES OF AMERICA

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vs.

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PAUL MEIR KLEINBORD, *Petitioner,*

vs.

UNITED STATES OF AMERICA

TRACY ROY ROGERS, *Petitioner,*

vs.

UNITED STATES OF AMERICA

PATRICIA BLAU, *Petitioner,*

vs.

UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

October Term, 1949

No. .....

JANE ROGERS, *Petitioner,*

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UNITED STATES OF AMERICA

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vs.

UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The petitioners pray that Writs of Certiorari issue to review the judgments of the United States Court of Appeals, Tenth Circuit, entered on January 5, 1950 (R1 - 306, 307) [1] in the cases of petitioners Jane Rogers, Irving Blau, Arthur Bary and Paul Meir Kleinbord, and also to review the judgments of the petitioners, Tracy Roy Rogers and Patricia Blau, entered on January 31, 1950 (R2 - 119), all of which judgments affirmed convictions of petitioners for contempt of the District Court of the United States for the District of Colorado (R1 - 7, 27, 96, 103) (R2 - 66, 111).

Opinions Below

The opinions of the United States Court of Appeals, Tenth Circuit, have not yet been officially reported. They appear in the records (R1 - 297) (R2 - 115).

Jurisdiction

The judgment of the Court of Appeals were entered on January 5, 1950 (R1 - 306, 307) as to petitioners Jane Rogers, Irving Blau, Arthur Bary and Paul Meir Kleinbord, and the order denying petition for rehearing was entered January 28, 1950 (R1 - 322). The judgments as to petitioners Tracy Roy Rogers and Patricia Blau were entered on January 31, 1950 (R2 - 119). The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

The issues raised in the trial court, the Court of Appeals and here deal almost exclusively with the applica-

[1] Since there are two records, the one in the cases of Jane Rogers, Irving Blau, Arthur Bary and Paul Meir Kleinbord will be referred to as (R1 -), and the record in the case of Tracy Roy Rogers and Patricia Blau will be referred to as (R2 -).

tion to petitioners of rights under the First, Fourth and Fifth Amendments to the Constitution of the United States.

We desire also to show that in the cases of Alexander et al vs. United States, decided by the Court of Appeals, Ninth Circuit, on February 4, 1950, there is a direct conflict with the decisions of the Court of Appeals in these cases. Thus, two United States Courts of Appeals have arrived at different conclusions on almost identical issues. The decision of the Ninth Circuit is rather lengthly and is not as yet reported, we shall refer to portions thereof which are pertinent to the issues in our brief.

Statement of Matters Involved

The petitioners herein were subpoenaed to appear before a Federal Grand Jury in Denver and questioned regarding their membership in, activities and associations in the Communist Party.

The purpose of the investigation was never revealed to the petitioners when they were witnsss before the grand jury nor to any one else connected with these proceedings, and actually became known only when presentments were filed, which applied only to three of the cases, yet even as to those they were unaware of the actual purposes while before the grand jury.

If the presentments indicate that the grand jury was convened here, as in many places throughout the country, including Los Angeles (where Alexander et al vs. U. S. was recently decided) ostensibly for the purpose of ascertaining whether there were any Communists in government employ; if that were the purpose of the inquiry, it was submerged by the true character of the inquiry as conducted in Denver, and as we understand, elsewhere throughout the country.

The actual aim of the inquiry, as appears from the nature of the questioning, appeared to be to ascertain who were the officials and members of the Communist Party in and about Denver. No reason was ever given why such an inquiry should be conducted. Whatever the concealed reason of the government in Denver, it is the fact that the government has indicted twelve officials of the Communist Party of the United States, for (1) conspiracy to advocate the overthrow of government by force and violence, by reason of their forming the Communist Party, and (2) their membership in that Party.

Three of the petitioners, Irving Blau[2], Tracy Roy Rogers and Patricia Blau, refused to answer any questions in that connection, claiming the constitutional privilege against self-incrimination (R1 - 30, 31, 53, 54) (R2 - 7 to 18, 19, 32 to 49) (R2 - 79, 82 to 90) See also opinion of Court of Appeals (R2 - 115). The petitioners Tracy Roy Rogers and Patricia Blau also made the showing that twelve leaders of the Communist Party were indicted under the Smith Act (Title 18 U. S. C. Sec. 10 and 13) (R2 - 20, 21, 103) and also for conspiracy to violate the Smith Act (Title 18 U. S. C. Sec. 11 and 13) (R2 - 22, 104). Further showings were made by Irving Blau that the Attorney General designated the Communist Party to be a subversive organization (R1 - 73). Likewise, did Tracy Roy Rogers show that the Attorney General has designated the Communist Party a subversive organization (R2 - 20), and that the Un-American Activities Committee has designated the Communist Party as subversive (R2 -

[2] The Court of Appeals erroneously found that "A perusal of his (Irving Blau's) entire examination before the grand jury indicates that it was established by his testimony or his answers that he was a member of the Communist Party." (R1 - 303) A very careful examination of the record fails to disclose any testimony or evidence which would justify that finding.

20). The showing was made on behalf of Patricia Blau that the Un-American Activities Committee had indicated the Communist Party is the agent of a foreign power (R2 - 95). All said petitioners also made additional showing of a similar nature. And these showings by petitioners Irving Blau, Tracy Roy Rogers and Patricia Blau were for the purpose of justifying their refusal to answer the questions asked on the constitutional ground that the answers may tend to incriminate said petitioners.

The petitioners Jane Rogers, Arthur Bary and Paul Meir Kleinbord answered some questions, the effect of which established membership in the Communist Party, but likewise, claimed the privilege against self-incrimination under the United States Constitution in refusing to answer other questions which would disclose their associations in the Communist Party, the membership lists, the number of clubs or cells, the names of the officers of the Communist Party of Colorado and other like questions on the ground that the answers may tend to incriminate them. (R1 - 14, 91, 101, 171 to 184, 188, 189, 191 to 195, etc., etc.). The petitioners Bary and Kleinbord also made the showing that the leaders of the Communist Party were indicted for conspiracy (R1 - 91, 93, 101, 103, 228) and that by answering questions regarding others, they may render themselves liable to similar conspiracy charges (R1 - 243, 244, 245, 246, 247, 248), and likewise made showings that the Attorney General and the Un-American Activities Committee have designated the Communist Party as subversive (R1 - 280).

The trial court rejected all claims of privilege against self-incrimination under the Fifth Amendment of the Federal Constitution and found petitioners guilty of con-

tempt. The Court of Appeals sustained the trial court.[3]

The petitioners also contended that questions regarding political views and associations were an invasion of petitioners' constitutional rights under the First Amendment (R1 - 91, 102, 252, 276, 277) (R2 - 8, 20, 34, 35, 38, 86, 87, 100)

The trial court refused to consider these contentions and the Court of Appeals in its opinion entirely disregarded that contention and made no mention thereof.

DUE PROCESS. The Court of Appeals referred in its opinion to irregularities which "leave much to be desired" in the proceedings before the trial court. (R1 - 298) This reference was the only recognition by the Court of Appeals to the contention by petitioners that there was a denial to these appellants of due process. We set forth from the record some of the more gross violations of due process, and will deal with them in our brief.

R1 - 51;

Mr. Goldschein: I have the original copy——

The Court: Read the transcript.

Mr. Goldschein: The Court may have it to refer to.

The Court: What page?

Mr. Goldschein: Beginning, may it please Your Honor, on page 35.

Mr. Menin: If the Court please, it seems to me that the witness is put at a disadvantage. I don't have a copy and they refused to let me see the testimony of what the complaint is about.

The Court: Listen to this testimony and if it isn't

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[3] We should like to point out that in the case of Nancy Wertheimer which the Court of Appeals passed on there was a reversal (R1 - 301). We will deal with that case as it relates to the others in our brief in support of this petition.

correct you can take it up. You don't need a copy.

Mr. Menin: Before I argue this matter I should have a copy of it.

The Court: You are not entitled to counsel. Please proceed.

Mr. Menin: Let the record show the Court indicates that the witness is not entitled to counsel at this stage of the proceeding.

The Court: What?

Mr. Menin: As I understand you—

The Court: I said I didn't think he was, but I said I would allow you to appear for them if you want to.

Mr. Menin: I am appearing for him, and as his counsel I demand the right to see what testimony is being complained of so that I may intelligently be able to defend him in this proceeding this morning.

The Court: You can listen to the record as it is read. That's the reason I'm having it read, so you can tell what it's about.

Mr. Blau: I'd like to have a copy of this transcript so I may follow it.

The Court: You're not entitled to it. Just be seated. I'll let it be read and you listen to it and if you want to correct anything, let it be read again.

Mr. Menin: Let the record show the Court has ruled we are not entitled to a copy of the proceeding upon which these proceedings are being heard at this time.

The Court: The Court holds that it isn't necessary. The record is to be read and you can listen and make any corrections in it or objections as you may be advised. Now please proceed.

Mr. Goldschein: May it please the Court, I refuse to let the defendant or his counsel see it.

At this point it will be noted that not only is a summary proceeding being held, but appellant and his counsel

are not even permitted to have a transcript so as to be fully advised of the matters complained about.

R1 - 75:

Mr. Blau: May I have a few minutes to consult with my counsel at this time?

The Court: What?

Mr. Blau: I request a few moments to consult with my counsel.

The Court: Step outside and come back in five minutes. (Whereupon Mr. Blau and his counsel, Mr. Menin, left the court room.)

Mr. Menin: If the court please, I have just received some very pertinent cases.

The Court: Where is the defendant?

Mr. Menin: He is still consulting with one of his friends out there.

The Court: Tell him to come back in Court. Bring him in court, Mr. Marshal.

Mr. Menin: I'll get him.

(Mr. Blau enters the court room.)

The Court: Will you step up here to the bar of the court?

Mr. Menin: May I, for the purpose of the record—

The Court: No, just wait a minute until the Court finishes. What is your name?

Mr. Blau: Irving S. Blau.

The Court: How old are you?

Mr. Blau: 34, sir.

The Court: Where were you born?

Mr. Blau: *Yonkers*, New York.

The Court: The Court having found you guilty of contempt and in violation of the laws of the United

States, it is the sentence and judgment of the Court that you serve a term of six months in jail and be committed to the custody of the Attorney General.

What is the next case?

It will be noted that petitioner Irving Blau was given five minutes to consult with his counsel, after returning to court, his counsel started to make a statement to the Court. The Court did not hear counsel and summarily sentenced petitioner to jail. At R1 - 28 there is a certificate of the trial judge, in which certificate the following appears: (R1 - 29)

> "That said Irving Blau *was afforded an opportunity to consult with Mr. Samuel D. Menin, his counsel, and after stating that he did not desire to change his answers, the Court found him guilty of contempt* and sentenced him to the custody of the Attorney General, as is shown by Exhibit "A" hereto attached." (Italics ours)

Exhibit "A" does not support the statement made by the Court. Exhibit "A" refers to the testimony above referred to R1 - 75 appearing in said exhibit as R1 - 34 and 35 where it expressly appears that the Court did not permit counsel or petitioner to make any statement, but summarily sentenced petitioner to jail.

And in R1 - 70:

> The Court: Let me see the case, please.
>
> Mr. Menin: I want to point out to your Honor that in this case the Court refers to the immunity statute and says——
>
> The Court: Let me see and I'll decide for myself.
>
> Mr. Menin: —and says that immunity would have obtained regardless of the statute.

The Court: You didn't mention immunity statute in your argument.

Mr. Menin: Well, I was trying to read the whole thing when your Honor stopped me. I was going to get to the whole thing, but I would point out to the Court—

The Court: Mr. Menin, please take your seat or the Court will have *to take sterner measures with you.* (Italics ours)

R1 - 79:

The Court: I can't agree with this opinion. Where is the party?

Mr. Menin: Well, may I have it? Now, just—

The Court: Just a minute.

Mr. Menin: This is something else. Just to show that I have not misrepresented to the Court, I would like your Honor to read the indictment.

The Court: I'm not concerned with that question. It doesn't throw any light on this question.

Mr. Menin: No, but it does throw light on the statements—

The Court: Will you please be seated? If you don't obey the Court *I will take you into custody.* (Italics ours)

A fair hearing is impossible where the efforts of counsel on behalf of his clients are constantly met with the threat of being placed in "durance vile".

In R2 - 32 the following occurred:

"So the Court therefore insists that you answer that question. Now, please let me know whether you

will answer it or not, yes or no.
Mr. Rogers: I can't answer that.
Mr. Menin: May I, on behalf—
The Court: Just a minute, Mr. Menin. Please be seated.
Mr. Menin: May I represent—
The Court: Mr. Menin, will you take your seat? Now, will you answer the question before the grand jury, Mr. Rogers.
Mr. Rogers: Your Honor, I can't answer the question just yes or not. I decline to answer the question on the ground that it would tend to incriminate me.
The Court: Incriminate you for what?
Mr. Rogers: While I agree that it is not a crime to be a member of the Communist Party, nevertheless people are being prosecuted for such, and the outcome of this case may well have a bearing on on the testimony that I give before this Court.
The Court: All right; what is next, Mr. Lilly?

It will be noted that the Court did not permit counsel to make a statement or explanation on behalf of appellant regarding a matter about which he was being interrogated, and it will be noted that before even permitting counsel to say anything in that regard, the Court proceeded to the next question.

In connection with the case of Arthur Bary, the record shows he was first purged of contempt (R1 - 162). Thereafter he again appeared in response to a show cause order and presentment of the grand jury. After argument on certain preliminary matters (R1 - 200 to 218) petitioner Bary was not given an opportunity to defend, but was

merely asked if he still refused to "answer those questions" (R1 - 219). Whereupon the Court found petitioner Bary in contempt.

Counsel for petitioner protested and pointed out the failure of the Court to give petitioner "an opportunity to proceed under the issues that were raised—by the presentment, the show cause order and the answer filed thereto. (R1 - 219)

The petitioner was then sentenced for contempt (R1 - 222) after being permitted to read a statement to the Court.

When counsel again called the Court's attention to the fact that the matter was determined without considering the issues raised by the answer (R1 - 223) and that appellant was not permitted to submit evidence to justify the position taken (R1 - 224). The Court replied, "Well, that isn't necessary."

At the commencement of the afternoon session when counsel appeared on behalf of another petitioner and almost as an afterthought, Court offered petitioner Bary an opportunity to be heard, but refused to vacate the order of contempt and sentence (R1 - 225).

Bary was first found guilty and sentenced. Thereafter he was accorded an opportunity to have the Court change its judgment. We had at that time a situation where the petitioner was first found guilty and sentenced and then offered a trial.

Such action by the trial court can hardly come within the meaning of due process of law as has many times been defined by this Court.

Patricia Blau was ordered to appear before the grand jury on January 4, 1949. She appeared, was taken before the grand jury and asked questions which she refused to answer, stating as her reason the privilege against self-incrimination and other matters set out hereinabove. That

same day she was ordered to appear in court (R2 - 75), whereupon the Court over the objection of counsel, immediately proceeded to hear the matter and when counsel objected to the haste in having the hearing on such short notice, the Court remarked:

> The Court: "Your client can tell you what happened and what she is here for. You know as well as I do and she knows. This is just a proceeding we have been through here a half-dozen times." (R2 - 76)

Finally, after further protestation of counsel, the Court allowed counsel the requested five minutes with the client (R2 - 78). It is quite apparent from the colloquy between Court and counsel that a request of more than a few minutes would have been denied. Thus, after five minutes' preparation, a hearing was held which resulted in petitioner receiving a one year prison sentence.

The most significant thing about Patricia Blau's case is that she was given the least amount of time to prepare her defense and given the largest sentence of any (R2 - 74, 98). Although her case was heard about four months after the other cases, and no presentment was filed against her, the Court of Appeals assumed she knew all about the matter under investigation (R2 - 116).

It will be noted that the Court of Appeals assumes that the presentments notified all petitioners of the charges. (R1 - 298). Yet petitioners Jane Rogers and Irving Blau were convicted of contempt before the presentments were ever filed against petitioners Barv, Kleinbord and Tracy Roy Rogers. The judgments in the cases of Jane Rogers and Irving Blau are dated September 23, 1948. (R1 - 7, 27) and the presentments against Barv, Kleinbord and Tracy Roy Rogers were filed on October 6, 1948 (R1 - 89, 100). The effect is that the Court of Ap-

peals on the one hand charges Jane Rogers and Irving Blau with having knowledge of a matter which had, at the time, not yet occurred, and on the other hand charges Patricia Blau with knowledge of pleadings filed in Court some three months prior in another proceeding with which she actually had no connection.

In the case of Irving Blau, the petitioner was found in contempt for the further reason that he refused to disclose the whereabouts of his wife, (Patricia Blau) claiming that his knowledge of her whereabout was gained by reason of a privileged communication (R1 - 30, 31, 53). The Court of Appeals in sustaining the trial court, in effect held that communications between husband and wife must be shown to be privileged, rather than to follow the rule laid down by this Court [4] and other courts of the United States [5] where the rule is that communications between spouses are assumed to have been confidentially made. Likewise the Court of Appeals disregarded the Colorado Statutes[6], which are here applicable. [7]

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the United States Constitution as it relates to the protection against self-incrimination.

2. The Fifth Amendment to the United States Constitution as it relates to due process of law.

3. The First Amendment to the United States Constitution as it relates to freedom of thought and advocacy

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[4] Wolfle vs. United States, 54 Sup. Ct. 279, 291 U. S. 7.
[5] Fraser vs. United States, 145 Fed. 2d 139.
[6] 35 C. S. A. Chap. 177, Sec. 9.
[7] First Trust Co. vs. Kansas City Life Ins. Co. 79 Fed. 2d 48.

and the right of the Government to compel disclosure of political opinion and association.

4. The Fourth and Fifth Amendment to the United States Constitution dealing with searches and seizures and the privilege against self-incrimination, giving the citizen the right of privacy and silence against any effort to compel disclosure of political associations and beliefs.

5. The Provisions of the 1935 Colorado Statutes Annotated, Chap. 177, Sec. 9:

> "9. *Who may not testify without consent*——— There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:
>
> First—A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor shall either during the marriage or afterward be without the consent of the other, *examined as to any communications made by one to the other during the marriage;* but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other . . . ." (Italics ours)

Questions Presented

1. Whether in a grand jury investigation a witness is justified in refusing to answer questions concerning membership in the Communist Party on the claim of privilege against self-incrimination in view of the fact that indictments were returned in New York City against persons who are alleged to be members of the Communist Party because it is charged in said indictments that said Communist

Party is "a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence".

2. Whether in a grand jury investigation a witness is justified in refusing to answer questions concerning associations and activities in the Communist Party on the claim of privilege against self-incrimination in view of the fact that persons associated in the Communist Party were charged with conspiracy "to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence...."

3. Whether in a grand jury investigation the Government can compel a disclosure of political views, activities and associations in view of the First Amendment to the United States Constitution.

4. Whether the Fourth and Fifth Amendments to the United States Constitution dealing with searches and seizures and the privilege against self-incrimination give the citizen a right of privacy and silence against any effort to compel disclosure of political associations and beliefs.

5. Whether in a grand jury investigation a witness is limited in claiming privilege against self-incrimination to matters under investigation or whether the privilege against self-incrimination extends to possible incrimination outside the matter under investigation.

6. Whether the proceeding in the trial court denied to petitioners herein due process of law.

7. Whether the husband may refuse to disclose a communication received from his wife regarding her where-

abouts on the ground that the communications between spouses are presumed confidential.

Reasons for Granting Writs

The Writs should be granted because:

I.

A. The decisions of the Court below conflict with the decision in Alexander et al, vs. United States of America, decided February 4, 1950 by the Court of Appeals Ninth Circuit.

B. The decisions of the Court below appear to be a departure from the law as heretofore determined by this Court were similar issues were involved.

C. The issues are of grave public importance in that constitutional rights affecting all the people are here involved.

D. Because petitioners were denied due process of law.

II.

In the decisions below the Court of Appeals has referred to the opinion in Burr vs. United States 25 Fed. cases, 14, 692e and has quoted from said opinion the rule there laid down to the effect that: (R1 - 299)

> "If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of *any crime*, he is not bound to answer it so as to furnish matter for that conviction." (Italics ours)

Yet the Court of Appeals, notwithstanding the showing

by petitioners that the Attorney General charged people who associated themselves in the Communist Party as conspirators to violate the laws of the United States, ruled that petitioners must answer questions regarding associations in the Communist Party, thus giving government power to compel persons to testify against themselves and then to use their testimony as a basis for criminal prosecutions.

The Court of Appeals likewise quoted with approval from Counselman vs. Hitchock, 142 U. S. 547 that: (R1 - 300)

> "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself."

Yet in this case, the opinion of the Court of Appeals would result in petitioners' being compelled to testify to matters which would furnish the evidence which would render them liable to the same crime charged under the New York indictments (R1 - 91, 93, 101, 103; 243 to 247, 276) (R2 - 20, 21, 22, 100, 103, 104, 79 to 97).

The Court of Appeals found that petitioners "did not base their refusal to answer the questions on the grounds that their answers might tend to incriminate them within the scope of the grand jury investigation," (R2 - 118), thus, limiting the constitutional privilege against self-incrimination to matters under investigation only. This is contrary to the rule laid down by this Court in Burr vs. United States supra and Counselman vs. Hitchock supra.

III.

The Court of Appeals erroneously found that the testimony concerning third parties could not incriminate peti-

tioners as it affected petitioners Jane Rogers, Irving Blau, Arthur Bary and Paul Meir Kleinbord (R1 - 305) when it was clearly shown that appellants' answers concerning others could well render them subject to conspiracy charges, as was the case in New York.

IV.

The Court of Appeals, insofar as its decision affects petitioner Irving Blau that his testimony establishes that he is a member of the Communist Party (R1 - 303), was clearly in error because the record fails to sustain such finding.

V.

Because the Court of Appeals erroneously ruled on the question of privileged communications between spouses (R1 - 305). The effect of the ruling by the Court below was that petitioner should have shown that communication was privileged. The rule laid down by this Court [8] is to the effect that communications between spouses are generally assumed to be privileged.

VI.

Because the Court of Appeals in the decision below has cited authorities by this Court and others, but in fact has arrived at conclusions contrary to said authorities.

Conclusion

For the reasons stated, we respectfully submit that this petition for writs of certiorari should be granted.

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614 E. & C. Bldg.
Denver 2, Colorado
Counsel for Petitioners

[8] Wolfle vs. United States 291 U. S. 7.

IN THE

Supreme Court of the United States

October Term, 1949

No. .....

JANE ROGERS, *Petitioner,*

vs.

UNITED STATES OF AMERICA

IRVING BLAU, *Petitioner,*

vs.

UNITED STATES OF AMERICA

ARTHUR BARY, *Petitioner,*

vs.

UNITED STATES OF AMERICA

PAUL MEIR KLEINBORD, *Petitioner,*

vs.

UNITED STATES OF AMERICA

TRACY ROY ROGERS, *Petitioner,*

vs.

UNITED STATES OF AMERICA

PATRICIA BLAU, *Petitioner,*

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinions of the Court of Appeals (R1 - 297) (2 - 115) are as yet not officially reported.

Jurisdiction

The basis of this Court's jurisdiction is set forth in the petition.

Specification of Errors

I.

The Court of Appeals erred in ruling that petitioners were in contempt because of refusal to answer questions in a grand jury investigation regarding membership in or connection with other members of the Communist Party, because of claim of privilege against self-incrimination in view of showing made that members of the Communist Party were indicted in New York on the charge that the Communist Party is "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."

II.

The Court of Appeals erred in finding that "they (petitioners, Jane Rogers, Irving Blau, Arthur Bary and Paul Meir Kleinbord) could not refuse to answer questions propounded to them concerning third parties when it is clear that such question could not incriminate themselves," when the showing was that persons associated in the Communist Party were in New York indicted for conspiracy to violate the Smith Act (Secs. 11 and 13, Title 18 U. S. C.)

III.

The Court of Appeals erred when it held that in effect petitioners' refusal to answer questions on the ground

that their answers might tend to incriminate them could not be sustained because the answers did not tend to incriminate them within the scope of the grand jury investigation.

IV.

The Court of Appeals erred in sustaining the District Court in adjudging petitioners in contempt for refusal to answer questions before the grand jury, which questions concerned political opinion, activity and association, in that under the First Amendment to the Constitution of the United States freedom of thought and advocacy are absolute and the Government has no right to compulsory disclosure of political opinion and association.

V.

The ruling of the Court of Appeals is in error in view of the Fourth and Fifth Amendments to the Constitution of the United States dealing with searches and seizures and the privilege against self-incrimination which gives the citizen a right of privacy and silence against any effort to compel disclosure of his political associations and beliefs.

VI.

The ruling of the Court of Appeals is in error in that it found that irregularities existed in the proceedings of the trial court, yet failed to deal with said irregularities.

VII.

The Court of Appeals erred in disregarding petitioners' showing that the trial court denied to petitioners due process of law.

VIII.

The Court of Appeals erred in attributing to certain petitioners who were already sentenced to jail the knowledge of the scope of the grand jury investigation as disclosed by the presentments later filed in reference to other petitioners.

IX.

The Court of Appeals erred insofar as its ruling concerned petitioner Irving Blau when said ruling appears to hold that communications between spouses must be shown to be privileged.

Summary of Argument

We shall show that under the Fifth Amendment petitioners had a right to refuse to answer questions before a grand jury concerning membership in or connection with the Communist Party on the ground that the answers may tend to incriminate them after they made the showing that members of the Communist Party were indicted for conspiracy to violate certain laws of the United States by reason of membership in said Communist Party. We shall further show that the right to claim the privilege is not limited to the matter under investigation.

We shall show that under the First Amendment to the Constitution of the United States petitioners have the right to freedom of thought and advocacy and the Government cannot compel disclosure of political opinion and association.

We shall show that under the Fourth and Fifth Amendments to the United States Constitution dealing with searches and seizures, the privilege against self-incrimination gives to the citizen the right of privacy and silence

against any effort to compel disclosure of his political associations and beliefs.

We shall show that in the trial court there was a denial of due process of law.

That as to petitioner Irving Blau the Court of Appeals erred on the question of privileged communications between spouses.

Argument

I.

Under the Fifth Amendment petitioners had the right to refuse to answer questions before the grand jury which would tend to involve them for the violation of any laws of the United States. That the privilege against self-incrimination is not limited to matters under investigation.

Under the Fifth Amendment to the Constitution of the United States "No person*** shall be compelled in any criminal case to be a witness against himself."

This Court (Counselman vs. Hitchock 142 U. S. 547, 35 L. Ed. 1110; Ballmann vs. Fagin 200 U. S. 186, 60 L. Ed. 433) has construed this provision to mean that a witness cannot be compelled in any proceeding to answer questions which would disclose facts tending to show the commission of a criminal offense or any element thereof, or any matter which would constitute a link in a chain of evidence establishing the commission of an offense, or any facts which would constitute an evidentiary lead to the existence of facts constituting such proof.

The petitioners refused to answer questions in connection with their membership, activities and associations in the Communist Party. The record discloses that while some petitioners refused to answer any questions con-

cerning membership, activities or association, others having admitted membership refused to answer concerning activities and associations in the Communist Party. (The places in the record where these facts appear are so very numerous that citation of the pages would be almost endless.)

Petitioners' grounds for refusal was that they feared the answers might tend to incriminate them. That they have reasonable ground to fear prosecution which may result from the disclosures made by them is amply demonstrated by the showing that twelve members of the Communist Party were indicted by a federal grand jury in New York wherein it is charged:

> "*****the defendant herein, has been a member of said Community Party of the United States of America, the defendant well knowing during all said period that said Communist Party of the United States of America was and is a society,****of persons who teach and advocate the overthrow of the Government of the United States by force and violence." (R1 - 93) (R2 - 21, 103)

In another indictment (R1 - 93, 94, 95) (R2 - 22, 104) a conspiracy is charged in organizing, teaching holding meetings, etc., wherein the principles of Marxism-Leninism are advocated by the defendants and that as members of the Communist Party, they conspired to overthrow the government by force and violence.

The petitioners further had ground to fear prosecution because of the findings of the Un-American Activities Committee, the designations of the Attorney General of the United States that the Communist Party is subversive and disloyal as well as the executive order of the President, designating the Communist Party as disloyal (R1 -

73, 91, 102, 280) (R2 - 20, 22, 95, 102).

Certainly petitioners in view of these matters had a right to refuse to answer because here there was definitely a *possibility* that they could be charged with crime, had they admitted membership in or connection with the Communist Party. The fact is that persons who are Communists have already *been indicted and during the pendency of these proceedings were convicted* in the District Court of the United States for the Southern District of New York.

The earliest pronouncement of the law on this subject in this country came from the great Chief Justice in the United States vs. Burr 25 Fed. Cases 38 where he set forth the principle that it is for the Court to decide whether there is a possibility of incrimination; if there appears to be such a possibility, it is for the witness alone to decide whether the answer would tend to incriminate him; in determining whether the possibility of incrimination exists, it is *not necessary* to find that the answer might directly tend to establish an element of the crime; *it is sufficient if it appears that the answer might constitute a link in a chain of evidence* to afford the government the means of proving a fact with respect to the alleged crime.

This Court in Counselman vs. Hitchock, 142 U. S. 547, 35 L. Ed. 1110, made an exhaustive review of the law in that respect. There a grand jury was investigating violations of a statute regulating railroad rates. The witness refused to answer when asked whether he knew of the practice of others in giving or receiving reduced rates or rebates. The Court among other things said:

> "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a

criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself committed a crime. The privilege is limited to criminal matters, but is as broad as the mischief against which it seeks to guard."

It was also there contended that the claim of privilege by the witness was unfounded because of an immunity statute, which in effect prevented evidence given under compulsion to be used against him in any proceedings to convict him of a crime or exact a penalty. The Court held that the immunity statute was no substitute for the privilege since it did not prevent the testimony from being used as evidentiary leads to disclose other facts or witnesses which might be used against him.

".....It (the immunity statute) could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." (Counselman vs. Hitchock Supra).

The only time a witness may be compelled to answer exists where the immunity statute forecloses any and all prosecution with reference to any transaction, matter or thing concerning which the witness testifies. In such case

the witness must testify notwithstanding the criminating nature of his answer because the immunity statute satisfies the basic reason for the privilege and cannot possibly be used as a basis for or *in aid of*, a criminal prosecution against the witness. The immunity statute must in effect be a "general ammesty" available to the witness. (Brown vs. Walker 161 U. S. 591, 40 L. Ed. 819). This situation did not obtain in the Counselman case, and, of course, does not obtain in the present case.

Again in Counselman vs. Hitchock, the Court referred to and adopts the language of the Burr case supra:

> "In June, 1807, Chief Justice Marshall, in the Circuit Court of the United States for the District of Virginia, in Burr's trial, (1 Burr's Tr. 244) on the question whether the witness was privileged not to accuse himself, said: "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be to answer the question or not. If, in such a case, he say, upon his oath that his answer would criminate himself, the Court can demand no other testimony of the fact.*****According to their statement, (the counsel for the United States), a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. *This would be rendering the rule almost perfectly worthless.* Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case that a wit-

> ness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact, of itself, might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. That testimony may be possessed or is attainable against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

The Court of Appeals misconstrues the meaning of the language in Brown vs. Walker 161 U. S. 591, cited in Note 1 of the opinion (R1 - 304) relating to waiver of the privilege against self-incrimination. The rule there enunciated applies to the case of a witness who voluntarily or in the language of the Court "*elects to*" (Page 597) give up or waive his constitutional privilege. But that was not the situation here. They were directed here to answer questions. (R1 - 87, 158, 163). The fact that they answered questions when directed, while refusing to answer others, does not constitute an election to waive, within the meaning of the Brown case.

Further than that, petitioners Jane Rogers, Arthur Bary and Paul Meir Kleinbord were "lured" into the answers they gave. In the case of Alexander et al vs. United States decided by the Court of Appeals Ninth

Circuit Feb. 4, 1950 where almost identical issues were involved the court in the Ninth Circuit quoting the very language used by the Court of Appeals in this case, said:

> "'Goldschein's stock statement to the witness that she was not under investigation and that the grand jury was not proceeding against her was not warranted. It was not for him to say what the scope of the grand jury's investigation was; neither was his statement a *substitute for her constitutional rights.*'
>
> While none of the witnesses rose to this lure, it is the duty of this Court not to pass unnoticed such conduct of a prosecuting officer towards any of the circuit's litigants when it appears in the record before us."

Can it be said that this conduct on the part of the prosecuting officer which tricked some of the witnesses into some answers amounted to a waiver of a constitutional right?

It must be remembered also, that petitioners Irving Blau, [1] Tracy Roy Rogers and Patricia Blau [2] refused to answer any questions regarding individual membership or connection, while the others refused to answer regarding connections with the Communist Party.

Thus, when here an individual petitioner was lured into answering regarding membership, but refused to answer regarding others who were associated with him or regarding the table of organization, number of cells or subdivisions there are in the Communist Party, or who was

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[1] As to Irving Blau, we challenge the record to show where he made any admission which could in any way indicate a waiver. See also Note 2 Page 4 of Petition.

[2] As to Tracy Roy Rogers and Patricia Blau, the Court of Appeals found they refused to answer any questions (R2 - 115)

working under his direction, petitioners waived no privilege because they were asked to furnish the leads which could open a field of inquiry which could well lead to prosecution for conspiracy, as was the case in the New York indictments.

The finding by the Court of Appeals that "they (petitioners) could not refuse to answer questions propounded to them concerning third parties when it is clear that such questions could not incriminate themselves" (R1 - 305) is clearly erroneous in the light of the showing made. Those third parties may well be the associates without which information a conspiracy charge could not be founded.

In that respect, we again call attention to the case of Alexander et al vs. U. S., supra, where the Court of Appeals Ninth Circuit said:

> "It is apparent that knowledge of a 'table of organization' or 'the duties of a Party' (hence its 'county officers') seeking the overthrow of the government by force necessarily would be secret. Such law-defying conspirators do not circulate through the community telling how they are organized for such a purpose and the duties of those directing such action.
>
> If any of the appellants be indicted for affiliation with or membership in the Los Angeles Communist Party as an organization either teaching or seeking the overthrow of the government by force, it well may be upon the prosecution to show the defendants' knowledge of the necessarily secret 'table of organization' or 'the duties' of such a Party. To answer, 'Yes, I know their table of organization' or 'I know the duties of the Party' would be an impugning supplying of the fact of his 'knowing' the purposes thereof' which is one of the essential factors in the crimes created by the Smith Act, supra.

Such an answer 'might tend to show that he himself had committed a crime' and is much more than giving testimony which would be of use 'to search out other testimony to be used in evidence against him' as in the Supreme Court's restatement of the principles of Counselman v. Hitchock, 142 U. S. 547, controlling the decision in Arndstein v. McCarthy, 254 U. S. 71, 73. In the latter case, succeeding Mason v. United States, infra, the Supreme Court said:

> " 'No person...shall be compelled in any criminal case to be a witness against himself.' Fifth Amendment. 'This provision must have broad construction in favor of the right which it was intended to secure'. 'The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.' Counselman v. Hitchock, 142 U. S. 564, 13 S. Ct. page 198, 35 L. Ed. 1110.'
>
> 'The protection of the Constitution was not removed by the provision in section 7 of the Bankruptcy Act (11 U. S. C. A. 25): 'No testimony given by him shall be offered in evidence against him in any criminal proceeding.' 'It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property'. Counselman v. Hitchock, 142 U. S. 564, 13 S. Ct. page 198, 35 L. Ed. 1110'.

In that case Arndstein was held not in contempt because, as stated by the court: '*It is impossible to say* from mere consideration of the questions propounded, in the light of the circumstances disclosed, *that they could have been answered with entire impunity.* The writ should have been issued.' (Emphasis supplied)

Arndstein v. McCarthy, supra, 254 U. S. page 72. Here it is clearly *possible* to say that the answers would tend to impugn Alexander and the others of the group.

Here is not the 'merely remote and naked possibility, out of the ordinary course of law and such as no reasonable man would be affected by,' of Mason v. United States, 244 U. S. 362, 365. Here is exactly the prosecution that a *reasonable* man would expect if actually guilty of conspiracy or association with conspirators to violate the Smith Act or one innocently associating with such conspirators and ceasing the association on discovery of its unlawful character. Such a conspiracy prosecution as here feared has no semblence to the possible prosecution for violating the Alaska gambling statute in the Mason case. At that time there was in Alaska no such general conspiracy statute as that for defrauding the United States nor a specific statute against conspiring to engage in a gambling game, such as the conspiracy statute in the instant case.

Learned Hand's opinion in United States v. Weisman, 2. Cir., 111 F 2d 260, 261, reversing the lower court, deals with an identical problem. There the question on which the witness claimed privilege was, 'Did he know anyone who visited, lived or stayed at Shanghai in the years 1934 to 1939?' As here, this question is innocuous on its face. As here, the witness showed a reasonable anticipation that he might be indicted for conspiracy to import narcotic drugs from Shanghai, just as exists a conspiracy indictment in New York and the Attorney General's likelihood to indict for conspiracy in Los Angeles.

Similarly, the opinion of Augustus Hand in United States v. Zwillman 2. Cir., 108 F. 2d 802, where

> the apparently innocuous question as to who were the witness' business associates in certain years was held likely to impugn him with reference to reasonable anticipated prosecution for a conspiracy to violate the liquor laws. The witness was prevented from showing that this answer might tend to incriminate him. There the district court again was reversed. See also the similar holding in United States v. Rosen, 174 F. 2d 187, 192."

In the case of Ballmann vs. Fagin 200 U. S. 186, 50 L. Ed. 433, this court likewise applied the rule of privilege in a case which arose out of a grand jury investigation of criminal liability of some employee of a national bank where large sums of money disappeared. The grand jury asked a witness to produce his cash book, he refused and was then asked questions "the manifest meaning of which was to fasten upon him that there was a cash book." He likewise refused to answer. In a contempt hearing, he offered to show that there were actions pending against him and others, charging them with conducting a scheme of gambling known as "bucket shop." The trial court was reversed on its finding of contempt.

The court recognized that a cash book, if the witness kept one, would likely disclose either receipt of missing cash or participation in bucket shop activities. From this alone with nothing more, this Court held the witness was entitled to claim privilege in connection with the demand to produce the book as well as questions designed to establish its existence. The decision is of special significance in that it reaffirms the extention of the privilege not only to prove a criminal offense but also to questions designed to *obtain evidentiary* leads to obtaining such proof.

In holding that the *possible* contents of the cash book, in the light of the investigation, disclosed sufficient cause

for a claim of privilege against production of the cash book, this Court in Ballmann vs. Fagin said:

> "*****The book very possibly may have disclosed dealings with the person or persons naturally suspected and especially in view of the charges that Ballmann kept a 'bucket shop', dealings of a nature likely to lead to a charge that Ballmann was an abettor of the guilty man. If he was, he was guilty of a misdemeanor in Rev. Stat. Sec. 5209, U. S. Comp. Stat. 1901, P. 3497 and no more bound to produce the book than to give testimony to the facts which it disclosed," (Citing Boyd vs. United States, 116 U. S. 616, 29 L. Ed. 746; Counselman vs. Hitchock, supra).

It is clear that the Court's holding rests on the proposition that answers to these questions might provide the government with evidentiary leads through which they might obtain the cash book or its contents. It is equally plain that in reaching this result in Ballmann vs. Fagin this Court knew it was applying settled law:

> "*****And without any inclination to enlarge a witness's rights beyond the settled requirements of law, we think that the privilege might extend to any question, the manifest object of which was to prove possession or control as a preliminary to calling for the book."

The scope of the privilege defined by these cases has never been reduced, Arndstein vs. McCarthy 254 U. S. 71, 65 L. Ed. 138; United States vs. Weisman 111 Fed. 2d 260; United States vs. Zwillman 108 Fed. 2d 802; United States vs. Cusson, 132 Fed. 2d 413; Foot vs. Buchanan 113 Fed. 156.

Of course we realize that the application of the privilege

must of necessity turn on the specific facts developed in each case.

Questions which on their face appear to be such that the answer might tend to incriminate, in that the answer in and of itself might tend to establish an element of the crime are of course privileged. (Counselman vs. Hitchock supra; Foot vs. Buchanan supra). In these cases the witness may claim the privilege without the necessity of any further showing of the danger to him. The questions involved in the present cases do directly tend to incriminate petitioners in the sense that the answers in and of themselves might tend to establish that *association* which constitutes one of the basic elements of the crime defined by the Smith Act.

In any event, even if it should not appear that the answer would tend to incriminate without a further showing, that showing was here made and the privilege claimed. In order to claim a privilege, the witnesses need only show:

(a) That the danger is real and that there is reasonable risk of prosecution. This is established either by *showing prosecution of others* with whom the witness is connected, or by threats of prosecution among whom the witness may be included (United States vs. Weisman supra; United States vs. Zwillman supra).

(b) That the answer to the question may constitute a link in a chain utilized to established guilt, or that it may furnish an evidentiary lead assisting the government in obtaining the proof necessary to establish its case.

Once the danger is indicated, there must be great liberality in favor of the witness in determining whether the answer might constitute a link in a chain of evidence, or evidentiary lead.

Regina vs. Boyes, 1 Best and S. 311, 329.

Foot vs. Buchanan, 113 Fed. 156, 160-1.

The reality of the danger was called to the Court's attention below. Petitioners referred to the Smith Act, Title 18 U. S. C. Section 10 to 13 (R1 - 91, 93, 101, 103, 228, 280), (R2 - 20, 21, 22, 104). They showed that members of the Communist Party were indicted because of membership (R1 - 43 to 45, 49, 91, 92 to 95, 101, 103, 116, 228, 247, 281, 290) (R2 - 20, 21, 22, 31, 41, 49, 51, 80, 81, 91). The Court recognized the fact that the indictments charged simply membership in the Communist Party (R1 - 80).

We submit the showings made was no imaginary or unsubstantial danger. Once the government can obtain an admission of membership or of association with the Communist Party from these petitioners, prosecution can be initiated as has been done in New York. If it can obtain only an evidentiary lead "the chase", in the words of Judge Learned Hand, will get "too hot" and the "scent too fresh". (United States vs. Weisman, supra). But this is not a game of fox and hounds, we are dealing with citizens of these United States and the Federal Constitution with embodies the basic law of the land. The limitation on governmental powers prescribed by the Fifth Amendment must be given full effect. In United States vs. Weisman the Court went on to say:

> "*****All crimes are composed of definite elements and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached. A witness would, for example, be privileged from answering whether he left his home with a burglar's jummy in his pocket, though that is no part of the crime of burglarly."

Thus, again the Court recognizes that acts which of themselves may be perfectly innocent, may constitute a link in a chain of evidence establishing guilt or point to the existence of such evidence. In such cases a witness need not testify concerning the apparently innocent acts.

The court then went on to say, that the "setting" established by the witness indicated that others were being charged with a conspiracy and that the answers to questions which were asked might tie him in with those other persons:

> "*****These things made it perilous for him to answer; if he had acknowledged such acquaintances it would probably have directly connected him with the principals in the conspiracy." United States vs. Weisman, supra.

On this point the Weisman case is so close to the case at bar as to be controlling. There the showing was a prosecution for conspiracy to violate the narcotics laws. Here the showing made is that the Communist Party is charged with conspiracy to violate the Smith Act. There the question was "Do you know persons who visited lived in or stayed at Shanghai in the years 1934 to 1939?" The question on its face appears to be proper, however it was held likely to refer to narcotic conspirators because of the showing. Here the questions asked deal with the officers, table of organization of the Communist Party, associations, membership lists, etc. All at a time when according to the showing of petitioners that members of the Communist Party are charged with conspiracy under the laws of the United States.

Not only did we make the showing but the Court actually recognized that people were being prosecuted simply and solely for being Communists and so stated:

(R1 - 80) The Court: After sentencing Nancy Wertheimer to jail directs his remarks to Mr. Menin) "This indictment, Mr. Menin, is for violation of Sections 10 and 13 of Title 18 of the United States Code, *and the charge simply is that the defendant is a member of the Communist Party.*" (Italics ours.)

Although the Wertheimer case was reversed, the record nevertheless shows that the trial court was aware of the fact that the New York indictments were based on membership in the Communist Party.

In the United States vs. Zwillman supra, a grand jury was investigating an alleged conspiracy "to commit any offense against the United States or to defraud the United States in any manner or for any purpose." The witness was asked who his business associates were in the years 1928 to 1932. The witness attempted to show, but was prevented by the trial court, that the grand jury had evidence that witness was engaged in liquor business during those years, that he was under investigation for income tax violations, that there had been testimony in another case to the effect that witness and others were engaged in illegal liquor activities in the years other than those referred to in the questions. Counsel for Zwillman stated to the Court that Zwillman had been in the liquor business up to 1933.

"******Evidence necessary to show that defendant was engaged in a conspiracy during the years 1928 to 1932 might well be supplied by proof of the names of business associates engaged in violating the laws relating to the manufacture or sale of liquor.*******"

Here again we see as in the Weisman case are involved questions concerning association which would tend to es-

tablish a conspiracy to violate the laws of the United States. In the Weisman case it was a conspiracy to violate the Narcotics Act. In the Zwillman case it was a conspiracy to violate "the laws relating to the manufacture or sale of liquor." In the case at bar it's the conspiracy to violate the Smith Act. In any event, in the case at bar the questions were such that the answers could well furnish "a link in the chain of incriminating testimony" (United States vs. Zwillman supra; Counselman vs. Hitchock supra).

Likewise in the case of United States vs. Cusson 132 Fed. 2d 413 the Court passed on a similar question of association. The witness was asked whether on a visit to Philadelphia in February 1942, she had "met with any of the Groveses." In support of her claim for privilege she showed that two men named Groves had been tried under an indictment in New York; that she went to Mexico before the trial and returned after its close; that although she had not been subpoenaed for the trial, government counsel asked her if she had been just before calling her before the grand jury. On this showing she claimed *possible* incrimination because her answer "might serve as a link in establishing that they told her to go to Mexico so as to avoid being called as a witness upon their trial and that this would tend to prove that she had conspired with them to obstruct justice."

In the Cusson case the question, "harmless enough on its face", raised a matter of association with other people which might tend to incriminate for violation of the laws of the United States by reason of a conspiracy to obstruct justice.

> "*******the question put to her by the prosecutor followed by the effort before the Grand Jury to learn whether she had talked with the Groveses just before

their trial, *in our judgment laid a warm enough scent to make its pursuit genuinely perilous to her.*" (Italics ours).

This case strikingly illustrates the approach laid down in Regina vs. Boyes supra, that where the danger is shown to be real "great latitude should be allowed to him in judging for himself the effect of any particular question."

We are not unaware of the rulings in Mason vs. United States 244 U. S. 326, 61 L. Ed. 1198; Camarota vs. United States, 111 Fed. 2d 243; United States vs. Flegenheimer 82 Fed. 2d 751 and United States vs. Weinberg 65 Fed. 2d 394.

An examination of these cases discloses that the claim of privilege was denied because the witness failed to establish any setting. This is also indicated in Alexander et al vs. U. S. supra.

In the Mason case the questions asked concerned whether witness saw games of cards played at a certain time and place. *No showing by the witness was made as to how these questions might incriminate him.* In sustaining the lower court this Court indicates that it is following the Burr case, supra, which as we have above indicated established the proposition that answers to questions may be incriminating where they constitute a link in a chain or furnish an evidentiary lead. This Court also cited Brown vs. Walker 161 U. S. 591, 40 L. Ed. 819 which lays down the rule that the privilege extends to evidence which may possibly "be used as a basis for, or in aid of, a criminal prosecution against the witness."

Also in that case there is quoted at length from Regina vs. Boyes supra, as laying down the correct rule. This English case holds that a showing must be made so that the Court can see "from the circumstances of the case and the nature of the evidence which the witness is com-

pelled to give, *that there is reasonable ground to apprehend danger to the witness* from his being compelled to answer."

The point in the Mason case is that the witness failed to make a showing of danger. In the Weisman, Zwillman and Cusson cases supra, such a showing was made. In the cases at bar such showing was made (R1 - 43 to 47, 49, 73, 92 to 95, 101, 116, 228, 247, 281, 290) (R2 - 20, 21, 22, 31, 33, 37, 50, 51, 80, 82 to 90, 99 to 102).

The Camarota case, supra, likewise failed to show a possibility of incrimination under federal law. The witness asserted he feared incrimination for violation of federal income tax laws. Although the opinion does not set forth, it appears that the answers had a tendency to incriminate under the state gambling laws. The privilege in a federal proceeding does not extend to incrimination under state laws. (United States vs. Murdock 284 U. S. 141, 76 L. Ed. 210). The fact that the Court relied on the Mason case also indicates failure to establish the setting showing possible violation of federal law.

In the United States vs. Flegenheimer, supra, a similar situation existed although Flegenheimer was charged with income tax evasion, the government claimed that this was accomplished in part through a bank account which he maintained under a fictitious name of Harmon, jointly with a man named Di Larmi. Di Larmi was called as a witness and asked whether he knew Harmon. He refused to answer but made absolutely no showing as to danger to himself. However the ruling in the Flegenheimer case is in extreme doubt. It was cited only once in In re Weisman 31 Fed. Sup. 190. The Weisman case was later reversed on appeal, United States vs. Weisman 111 Fed. 2d 260. There was no review of the Flegenheimer case by this Court. The case is in conflict with Ballmann vs. Fagin, supra, above discussed.

The case of United States vs. Weinberg, supra, simply follows Brown vs. Walker, supra, holding the immunity statute is adequate if it is co-extensive with the constitutional privilege.

We contend therefore that where as here a sufficient showing is made of the possible danger, the witness need not go on and "show how the incrimination might occur. To do so might make the privilege valueless." Russell vs. United States 12 F. 2d 683. (Cert. denied 273 U. S. 708, 71 L. Ed. 851).

On June 29, 1947, in the matter of In Re Emil Costello, the District Court of the United States for the District of Columbia, (an unreported case) the following opinion was handed down:

> "THE COURT (Pine, J.): I have before me the question of the constitutional safeguard against self-incrimination. The case that is cited time and again by all the authorities and by the Supreme Court of the United States is the case of the United States vs. Aaron Burr, and in that case Chief Justice Marshall has this to say about this provision of the Constitution:
>
> > 'When a question is propounded (a question which the witness declines to answer upon the ground that it may tend to criminate him), it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The Court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without know-

ing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily, then, from this statement of things, that if the question be of such a description that an answer may or may not criminate the witness, according to the purport of that answer, it must rest with himself who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact.'

That case was cited in Counselman vs. Hitchock and more recently in Mason vs. United States, both in the Supreme Court of the United States.

Therefore, following that decision, I have before me the decision to determine whether the answer may or may not criminate him. If it is a question of such a description that the answer may or may not criminate him, it must rest with the witness, and if, in such a case, the witness say upon his oath that his answer could criminate him, the court can demand no other testimony of the fact.

In this case the defendant has refused to answer the question whether he is a member of the Communist Party and the question whether he has attended certain meetings of the Communist Party, all of which would go back to the basic question of whether he is a member of the Communist Party.

In view of his testimony, I am of the opinion that this question is of such a description that the answer may or may not criminate the witness. Having said that upon his oath that it would criminate him, I can demand no further testimony of the fact. It is more important, in my opinion, that these

> constitutional safeguards be preserved for all the people all the time, than that the Government be permitted to pursue this particular line of inquiry in his particular investigation. Accordingly, the proceedings will be dismissed, the grand jury will return to the grand jury room and resume their labor, the witness will return to the grand jury room, if counsel for the Government wish to ask him further question. I return the transcript to counsel." (Italics ours.)

It will be noted in the Costello case the only showing required by the Court was the statement under oath that the answer would incriminate. That case and the Alexander case, supra, are especially significant because they are almost exactly in point with the case at bar and because in both cases the refusal to answer questions before the grand jury was found not to constitute contempt in one instance by the trial court and in the other by the appellate tribunal.

The Court of Appeals reversed the Wertheimer conviction on the theory that she might have been a government employee and have previously under oath answered the question as to whether she was a Communist in a way that might now subject her to a perjury charge (R1 - 301, 302) But the protection of the Fifth Amendment is broader than this. The refusal of a witness to answer cannot depend solely upon whether he had ever been government employee. Questions asked in an investigation presumably related to one subject may open the door to, or constitute a link in, the chain leading to the prosecution of the witness for alleged violations wholly outside the grand jury investigation. (U. S. vs. Rosen 174 Fed. (2) 187. Counselman vs. Hitchock 142 U. S. 547. Alexander

et al vs. United States—Fed. 2d—9th Circuit, decided February 4, 1950.)

One may, of course, refuse to answer questions which tend to establish the commission of an offense of the matter under investigation on the ground of privilege against self-incrimination. But the constitutional privilege against self-incrimination is not limited to the matters under investigation alone. A witness is privileged against answer:

> "If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of *any crime.*" (emphasis ours) (Burr vs. United States, 25 Fed. Cases 14, 692e)

The Court of Appeals was, therefore, clearly in error in limiting the privilege to the matter under investigation as it did in both decisions here being considered. (R1 - 297) (R2 - 115) The significant thing is that the Court of Appeals actually cited the quotation from Burr vs. the United States. The Court of Appeals cited good law, but didn't apply it.

As heretofore pointed out in the case of Alexander et al vs. U. S. supra, the facts were almost identical. As a matter of fact, Mr. Goldschein, the special assistant to the Attorney General, who prosecuted the cases in Denver, then went to Los Angeles and employed the same tactics there.

Further, the Court of Appeals in the footnote to its opinion refers to the case of Schneiderman vs. United States 320 U. S. 118 (R2 - 118) to show that it is not a crime to be a Communist. In the Alexander case Mr. Goldschein advanced the same argument and the court there said:

"The principal argument made by the government is

that such questions as to the membership and organizational setup of the Communist Party of Los Angeles could not possibly incriminate the appellants on a charge of such membership or affiliation with such members because of the decision of the Supreme Court in Schneiderman v. United States, 320 U. S. 118.

This is an extraordinary argument. The Schneiderman case decided that the evidence before it *was insufficient to show* the Communist Party advocated the overthrow of the government by force. It stated at page 157:

> 'There is a material difference between (1) agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil and (2) mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time...'

and at page 158 held:

> 'Under the conflicting evidence in this case we cannot say that the government has proved by such a preponderance of evidence that the issue is not in doubt, that the attitude of the Communist Party of the United States in 1927 towards force and violence was not susceptible of classification in the second category. . . . In so *holding* we do not decide *what interpretation of the party's attitude toward force and violence is the most probable on the basis of the present record*, or that petitioner's testimony is acceptable at face value.' (Emphasis supplied)

being preceded by the following at page 155:

> '*On the basis of the present record* we cannot say

that the Communist Party is so different in this respect that its principles stand forth with perfect clarity and especially is this so with relation to the crucial issue of advocacy of force and violence, upon which the government admits the evidence is sharply conflicting.' (Emphasis supplied.)

We do not agree that, because of the Schneiderman decision in 1943, in 1948 the branch of the Communist Party in Los Angeles could not possibly be composed of persons organized in violation of the Smith Act to overthrow the government by force or to teach such overthrow or composed of persons affiliating with such an organization.

The pertinent portion of the Smith Act, 18 U. S. C. 2385 is:

'Whoever organized or helps or attempts to organize any society, group of assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—...'

Circuit Judge Pope, in a concurring opinion in Alexander et al vs. U. S. supra, put it thusly:

"I concur in the result reached but not in some of the things said in the opinion of Judge Denman, in which two of the other members of the court have joined. The Smith Act provides that under certain circumstances membership in, or affiliation with a group of the kind described in the Act is in itself one of the elements of a crime. I think therefore, *that the proof that indictments based on this very section of*

the Act charging violation by virtue of membership in the Communist Party where pending in New York, was sufficient to make the showing of reasonable ground to apprehend danger under the rule in United States v. Burr, Fed. Case 14,692e, United States v. Mason, 244 U. S. 362, and United States v. Rosen, 174 F. 2d 187, cert. den. 398 U. S. 851. . . ." Italics ours)

The Bill of Rights, more particularly the Fifth Amendment, must be read in the terms of pre-revolutionary American and British law with all the content of the struggle of those times. The protection against self-incrimination is not the development of modern criminal litigation, but is the course of experience in which men were required to conform in their religion and politics, and such conformity was enforced through compulsory disclosures.

The Attorney General has determined upon a policy of prosecuting Communists. He has brought indictments to that end in New York. Under these circumstances, we submit that he cannot compel testimony from potential victims, testimony which would in itself be incriminating or would supply the evidentiary lead which could then be pursued by the government, leading to indictments here. The Department of Justice pursued a two-faced policy when it said it is a crime to be a Communist in New York and not a crime to be one in Colorado. While we contend it is not criminal to be a Communist anywhere in the United States, nevertheless it is the Department of Justice that institutes the proceedings and having done so in one part of the United States, *petitioners could well apprehend danger* and were well within their rights in refusing to answer the questions before the grand jury regarding

their views, activities, and associations, if any, in the Communist Party.

The trial Court has indicated that it is no crime to be a Communist, likewise government counsel has so stated. With that we agree as above contended. Now if the trial Court, the Court of Appeals and government state that it is not criminal to be a Communist, then what right does the government have to compel one to disclose his or her political views and associates. Under the First Amendment the political and religious convictions of individuals are sacred. In the sphere of religion and politics insofar as it affects the thinking, advocacy and associations of individuals, the government may not intrude as we shall show. On the other hand, if the government, through the same Department of Justice, charges it is criminal to be a Communist, as it has already done, *then the inevitable conclusion cannot be denied that these petitioners had a right to refuse to answer for fear of self-incrimination.*

II.

Petitioners under the First Amendment of the Constitution of the United States have a right to freedom of thought and advocacy and the Government cannot compel disclosure of political opinion and association.

It has been shown that the questions put to petitioners before the Grand Jury were directed to their political affiliation. *Pro tanto* the questions were also directed to their political belief. The point of the proceedings below was that they were designed to compel petitioners to disclose their political beliefs and associations. Compulsory disclosure of such matters is beyond the power of government. Individuals under the First Amendment have an absolute right to whatever political beliefs and political associations they choose. Their rights are paramount to the authority of government.

The First Amendment was conceived and has been applied as a charter of government, purposed to vouchsafe to the people their sovereignty over the state. The American Revolution established the supremacy of the people and their right to select their form of government, to determine its policy, to choose their agents to administer that policy, and if need be, to change the very form of government itself. Indispensable to the preservation of these rights is the freedom formulated in the First Amendment. The political system created by the Constitution can function only when the people are free to advocate all forms of political thought, discuss and associate with others of similar views. Only when people are relieved of all restraint in the intellectual process of political speculation can the basic law of the land receive its full meaning.

> "They (i.e. those who won our independence) believed that freedom to think as you will and to speak as you think are indispensable to the discovery and spread of political truth——". (Brandeis J. concurring in Whitney vs. California 274 U. S. 357, 71 L. Ed. 1095).

This freedom to think and speak can only exist when the government is denied the right to inquire into the political beliefs, thoughts and associations of the people.

> "The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come. Instead, they wrote Article 5 and the First Amendment, guaranteeing freedom of thought, soon followed*******".
>
> . . . . . .
>
> "*******Whatever attitude we may individually hold

> toward persons and organizations that believe in or advocate extensive changes in our existing order, it should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment." (Schneiderman vs. United States, 320 U. S. 118, 87 L. Ed. 1796).

The struggle out of which the American concept of government emerged pointed to the dangers of government coercion upon the minds and will of the people.

> "This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties." (Schneider vs. Irvington 308 U. S. 147, 84 L. Ed. 155. See also Stromberg vs. California 283 U. S. 359, 75 L. Ed. 1117; De Jonge vs. Oregon 299 U. S. 353, 81 L. Ed. 278).

We say that when petitioners were brought before the grand jury and questioned about their political beliefs, their activities and associations then "a political straight jacket" was being placed around them. No other conclusion can be reached except that they were being restricted in the enjoyment of liberty of political thought when they were made answerable regarding such thoughts, beliefs and associations.

> "******Those who begin coercive elimination of dissent soon find themselves exterminating dissenters

Compulsory unification of opinion achieves only the unanimity of the graveyard.

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.******"

* * * * * * * * *

"If there is any fixed star in our constitutional constellation, it is that *no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.* If there are any circumstances which permit an exception, they do not now occur to us." (Board of Education vs. Bernette, 319 U. S. 624, 87 L. Ed. 1628). (Italics ours).

Under the American Constitutional system of government, the right to free speech and free thought is absolute. The government can never interfere with speech or advocacy as such. When words are used not to persuade but to incite to violence and crime the state may interfere—not gainst the speech but against the violence and crime. But even here the state may interfere only when the nature of the words and the circumstances of their use create an extremely imminent danger of the evil the state can prevent—not where the opportunity for discussion still remains. (Rutledge J. in Musser vs. Utah 92 L. Ed. 355, 359, Adv. Op (1948); Thomas vs. Collins 323 U. S. 516, 89 L. Ed. 430; De Jonge vs. Oregon supra; Thornhill vs. Alabama 310 U. S. 88, 84 L. Ed. 1093; Bridges vs. California 314 U. S. 252, 86 L. Ed. 192. See quotation from Thomas Jefferson in Reynolds vs. United States 98 U. S. 145, 25 L ED 244).

When the trial court sought to compel the petitioners to

answer regarding political thought, activity and association, it was treading on forbidden ground. For the reason that while more may be claimed for the scope of the First Amendment, at the very least it is correct to say that the individual is free to hold any political ideas he may deem best and to associate with others to advance those ideas. The minimal reach of this freedom is to deny the government power to compel a disclosure of his political beliefs and associations. In the case at bar we are not concerned with an individual's willingness to make such disclosures. *We are concerned only with the government's power to compel them.*

Assembly and association are but the methods by which freedom to think and speak are realized in the political sphere. Mere isolated opinion and purpose has no effective existence. The essence of democracy, in our society, is the opportunity for any one or more, unrestrained by government, to become a majority. To limit this opportunity through compulsory disclosure of beliefs and association destroys the very right which the Constitution seeks to protect. The right to assemble and associate are secured only when government ~~cannot~~ interfere.

> "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore, appears to be almost as inalienable in its nature as is the right of personal liberty. No legislature can attack it without impairing the foundations of society." (de Tocqueville, Alexis, Democracy in America (N. Y. 1946), Vol. 1, page 196).

The right of political associations is as effectively abridged by the process of compelling the participants to

disclose them through grand jury interrogations as well as by criminal prosecution. We would be blind to the facts of the time if this grand jury investigation were viewed as an isolated phenomenon. New York, Los Angeles and Denver are not the only cities where grand juries are attempting to pry into the thoughts, ideas and associations of political minorities. The official governmental drive against Communists and their philosophy dates back to the old Dies Committee of more than a decade ago. Since then, except for the brief interlude when our government and the Socialist State made common cause against Nazism and Fascism, the campaign against Communism has achieved, in a rising crescendo of partisanship and political bigotry, the full panoply of a crusade. Federal and state legislative committees have arrogated to themselves the power to summon citizens and their papers and force them to disclose their political convictions. Organizations of all kinds—political, fraternal, social and economic—as well as individuals—scientists, actors, artists, writers, men of distinction in their field—have been subjected to similar scrutiny and inquisition. These committees have had the audacity to affix their seal of disapproval on a vast gamut of ideas current in the thinking of our citizens today. For the Courts to put their stamp of approval on this type of inquisition, for the Courts to approve inquiry into political ideas and associations, whether by grand juries or legislative committees, means the end of the Bill of Rights. It means we are slowly but surely following the course which will lead to a destruction of the liberties and rights of the people and the creation of a police state. It will mean that though we have won the war we have lost the peace.

Already we see that whenever anyone advocates the "verboten" ideas or whenever anyone associates with others for the purpose of such advocacy, he is subject to

being labeled a Communist. One so labeled, whether he is in fact or not a member of the Communist Party, finds his social and economic existence threatened, and may well face the danger of criminal prosecution. That Communists are being prosecuted is an established fact. [3] (R1 - 92 to 95) (R2 - 21, 22). Thus for the government merely to say it is not criminal to be a Communist is of no consolation to petitioners and in no way justified the inquisition and proceeding below. The petitioners' right to be or not to be members of the Communist party is a choice for them alone to make and they alone may disclose the fact or keep it locked within the seclusion of their own bosom. We conceived it to be the law of this land that citizens have indefeasible rights of privacy attendant upon the matters of their minds, their beliefs and their affiliations.

The safeguard of the Constitution grew out of the struggles for political freedom against the very devices which are in this case being used once again to suppress that freedom.

III

The Fourth and Fifth Amendment to the United States Constitution dealing with searches and seizures and the privilege against self-incrimination give the citizen a right of privacy and silence against any effort to compel disclosure of his political associations and beliefs.

The Bill of Rights conjoins the guarantees of the First Amendment with the safeguards against unreasonable searches and seizures and self-incrimination of the Fourth and Fifth Amendments to achieve protection against com-

[3] Communist have not only been prosecuted but have been convicted in the Southern District of New York on indictments based solely on membership in the Communist Party.

pulsory disclosure of private opinions and affiliations. Tempered in the fire of religious and political upheaval and hammered out in the struggle of the human mind to rid itself of oppression, these protective shields were developed to meet the same intrusions on the individuals privacy of opinion and affiliation as that presented in the case at bar. The privilege against self-incrimination finds its genesis in the struggle against enforced conformity to the established religion and to the divine rights of the Stuart monarchs. Techniques developed in England for the searching out of heretics and political dissenters were adopted in colonial America by royal governors and later by post-Revolutionary War state governments for the suppression of tories. This long and bloody history was fresh in the minds of those who won our independence, and it was to prevent its recurrence that the Bill of Rights was written.

In 16th Century England, the state religion through the ecclesiastical courts undertook a crusade against heresy in which compulsory disclosure of belief was the principal weapon. Following a secret inquisition in which the surmises and gossip and malevolence of neighbors and townsmen had been gathered, the accused was brought to trial, placed under oath and interrogated concerning his religious views. (See Henry Charles Lea, A history of the Inquisition of the Middle Ages, I, p. 407)

This procedure received a telling blow when Sir Edward Coke, Chief Justice of Common Pleas, granted a writ of prohibition against the High Court of Ecclesiastical Cause in the Edward Case, 13 Rep. 9. Coke's ruling was a recognition that men may not be examined or adjudged upon their opinions and beliefs.

> "——in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words and not of the intention or thoughts of his heart:

> and if any man should be examined upon his oath of opinion he holdeth concerning any point of religion, he is not bound to answer the same."

Compulsory disclosure persisted in England and became a weapon of the Court of the Star Chamber, designed to suppress political dissent. Here again, individuals were summoned on the basis of rumor and gossip, questioned concerning their beliefs concerning absolute monarchy, and adjudged upon that which they held in their minds. This method foundered in the case of one John Lilburn, an opponent of the Stuarts who, before the Star Chamber, refused to answer questions "concerning other men to ensnare me and to get further matter against me" (see 3 How St. Trials 1315, et seq.) Although Lilburn was whipped for his resistance, his case led to the abolition some two years later of the Court of the Star Chamber and to the statutory prohibition that compulsory disclosure no longer be required in penal matters. So deeply did the revulsion of that entire procedure run that a few years later Lilburn's sentence was vacated and he was granted handsome reparation for the punishment he had been given.

The struggle against such compulsory disclosure was deeply imbedded in the factors which led to the early emigration to America. Not only was it used to exact conformity but it was also used to harass dissenters who had determined to leave the country. (see R. Certer Pittman, 21 Va. Law Rev. 763, et seq.) In colonial America, the same device was used to exact conformity from those who dissented from the prevailing religious views in Massachusetts. The story of the trial of Ann Hutchinson, who was banished for unorthodoxy from the Massachusetts colony after conviction upon compelled admissions under oath, has been told by Mr. Justice Black. Adamson v. California, 332 U. S. 46, 88, 89, 99 L. Ed. 1903, 1928.

As it was there pointed out, such experiences as Mrs. Hutchinson's led to the public demand for the Bill of Rights in order to erect a barrier against law "That encroached on the domain of belief," and "strip courts and all public officers of a power to compel people to testify against themselves."

Later, following the Revolutionary War, tories in some states were required to give oaths respecting their past allegiance to the revolutionary cause as a condition of voting or holding property. Such a requirement in Pennsylvania was voided on the basis of language in the state constitution similar to that of the Fifth Amendment prohibiting self-incrimination. Respublica v. Gill, 3 Yeates 429, discussed at 161 U. S. 633, 40 L. Ed. 833.

Alexander Hamilton led the battle against similar legislation in New York and his writing contributed largely to the decision of the United States Supreme Court in Cummings v. Missouri, 71 U. S. 277, 330, 10 L. Ed. 356. These evils were designedly prohibited by the Bill of Rights which was established to protect the citizens against the possible tyrannies of the new government should it find itself indulging in the practices of English and continental despotism.

This Court has recognized these origins of the Fourth and Fifth Amendments. The principles laid down by Lord Camden in Entick v. Carrington, 19 How. St. Trials 1029, who denounced the general search warrant, were taken over by this Court in its construction of the Fourth Amendment. Here the search warrant was denounced in these words:

> ". . . .It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and

private property, where that right has never been forfeited by his conviction of some public offense."—Boyd v. U. S. 116 U. S. 616, 630, 29 L. Ed. 746, 751.

It is now judicially recognized that because of their very historical background here traced these two amendments conjoin to protect individuals from inquisitorial investigation in matters of the mind and of their private papers and effects. See Brown v. Walker, 161 U. S. 591, 596, 40 L. Ed. 819, 821.

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, in Weeks v. United States 232 U. S. 383, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385) have declared the importance to *political liberty* and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantee to the other fundamental rights of the individual citizen;—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers."—Gouled v. United States (1920) 255 U. S.

298, 303, 65 L. Ed. 647, 650, Clarke, J. (Italics ours.)

"No one can read these two great opinions (Entick vs. Carrington, 19 How. St. Tr. 1030, 1074, and Boyd v. United States, supra), and the opinions in the Pacific R. Commission case, without perceiving how closely allied in principle are the three protective rights of the individual—*that against compulsory self-accusation,* that against unlawful searches and seizures, and *that against unlawful inquisitorial investigations.* They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine,* lest it serve as a precedent for further advances in the same direction or for wrongful invasions of the others." Sutherland, J., Jones vs. Securities and Exch. Com. (1935), 298 U. S. 1, 28, 80 L. Ed. 1015, 1027. (Italics ours.)

See also U. S. v. Bell, 81 Fed. 830, at 836.

In the middle of the 19th Century, congressional investigations were made of alleged election irregularities in New Jersey and elsewhere. In these cases voters were summoned and asked how they voted. Their refusal to testify was respected by the Legislative Committee and secondary evidence was taken on the question. The right of the citizen to keep secret his political conviction and vote was accepted as a matter of course.

Congressional Globe, 29th Cong. 1st sess. 1845-46, app. p. 453.

The Fourth and Fifth Amendments when viewed historically therefore, have as their central theme and direc-

tion the protection of individuals from the very type of inquisition presented by the facts in this case. They protect not simply the suspected Narcotics Act violator or the sharp merchant who may have violated the Interstate Commerce Act (compare U. S. v. Weisman, 2 Cir., 111 F 2d 260, and Counselman v. Hitchock, 142 U. S. 547, 35 L. Ed. 1110) against the possibility of criminal prosecution and punishment; they were designed primarily to protect the persons and organizations whose views run counter to either official orthodoxy or prevailing opinion. They were developed so that the rights outlined in the First Amendment could have protection in practical life from the interests of those who would not tolerate opposition. The First Amendment defines the right of political belief and affiliation. The Fourth and Fifth Amendments are impassible barriers into the use of governmental power to limit or destroy the exercise of such rights.

IV.

The Court of Appeals erred in disregarding petitioners' showing that the trial court denied to petitioners due process of law.

The opinion of the Court of Appeals makes no mention whatever regarding the contention of denial of due process and the showing made in support thereof.

The only comment by the Court of Appeals is that:

> "The proceedings before the trial court were in some manner irregular and leave much to be desired..." (R1 - 298)

In the cases of petitioners Jane Rogers, Irving Blau and Patricia Blau, the government served no charges against them. The fact is that Jane Rogers and Irving

Blau were convicted of contempt on September 23, 1948 (R1 - 7, 27). Yet the Court charges said petitioners with knowledge of the content of the presentments in the Bary, Kleinbord and Tracy Roy Rogers cases (R1 - 298) (R2 - 116) when in point of time petitioners Jane Rogers and Irving Blau could not possibly have been aware of the object of the grand jury investigation because that was not disclosed until October 6, 1948 when the presentments were filed (R1 - 89, 100) (R2 - 6). We think the Court of Appeals expected something beyond the realm of human possibility when it expected said petitioners to have knowledge of "the posture of the case before the trial court on the presentments in contempt", (R1 - 304) which were not filed until some two weeks after their conviction. This certainly can hardly be regarded as a mere irregularity.

Further in the cases of Jane Rogers, Irving Blau and Patricia Blau there were no charges filed. We contend that the contempt even if it is direct but out of the actual presence of the Judge and not within his hearings or vision, due process of law requires that the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.

Camarota vs. United States, 111 F 2d 243.

Cooke vs. United States, 267 U. S. 517, 18 U. S. C. Sec. 401.

Rule 42 (a) Federal Rules of Criminal Procedure.

The adjudication and sentence for criminal contempt if under Sec. 402, 18 United States Code, Crimes and Criminal Procedure, Congressional Service (R1 - 8, 27) (R2 - 98) was invalid (a) because that section pertains only to indirect contempts which "constitute also a criminal offense under any statute of the United States", and (b) because the petitioners Jane Rogers, Irving and

Patricia Blau were not given notice of hearings as required by law.

18 United States Code, Crimes and Criminal Procedure, Congressional Service, Sec. 402, 3rd paragraph.

Rule 42 (b) Federal Rules of Criminal Procedure.

Thus adjudication and sentence of petitioners Jane Rogers, Irving Blau and Patricia Blau amounted to a finding and sentence for an offense for which they were neither charged nor tried. The trial Court's action plainly denied them the "rudimentary requirements of fair play." Norgan vs. United States 304 U. S. 1.

In Cooke vs. United States, supra;

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that accused should be advised of the charges and have reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony*******".

And to the same effect is People vs. McKinley, 11 N. E. 2d 933, 367, Ill. 504; Ex Parte Daws, 239 Pac. 689, 31 Okla. Cr. 397; Cannon vs. State, 55 Pac. 2d 135, 58 Okla. Cr. 451; Ex Parte Reily 62 Pac. 2d 1035, 60 Okla. Cr. 217. These cases are also applicable to the following situation:

In the case of Irving Blau (R1 - 51 to 53) the testimony is set out on pages 6 and 7 of the petition hereof) the Government, by its special prosecutor, Mr. Goldschein, absolutely refused to permit petitioner or his counsel to see what they were being charged with. Mr. Goldschein stated to the Court, "I refuse to let the defendant (petitioner) or his counsel see it." (R1 - 53). The Court sustained the Government's position. Can this too be said to be a mere irregularity?

Not only was a summary hearing held without any

formal charge, but petitioner and his counsel were not even permitted to have a transcript so that they could follow the evidence and be fully advised of the matters complained about. We submit that all the rules of fair play and due process were utterly and brazenly denied petitioner.

Petitioner Irving Blau was given five minutes to consult with his counsel (R1 - 75). After returning to Court, his counsel started to make a statement to the Court. The Court refused to permit counsel to speak and summarily sentenced petitioner to jail and called for the next case. (See page 8 hereof).

We also call attention to page 9 hereof, where there appears the Certificate of the trial Court, (R1 - 29) alleging that petitioner *"was afforded an opportunity to consult with Mr. Samuel D. Menin, his counsel, and after stating that he did not desire to change his answers, the Court found him guilty of contempt....."*

The fact is that the record simply does not support any such thing. The fact is the Court permitted petitioner five minutes with his counsel and then refused to permit petitioner or his counsel to say anything to the Court. (R1 - 75)

In conjunction with petitioner Bary (see page 11), petitioner Bary, in short, was first found guilty and sentenced. Thereafter, he was afforded, grudgingly, an opportunity to change the judgment of the Court. His hearing then was the very converse of what our juridical tradition conceives of due process. Sentence first and trial afterwards is an innovation in our system of justice.

A witness cited for contempt may not be punished without due process of law. Cooke vs. United States, supra; Camarota vs. United States, supra; 16 C. J. S. 1169.

The right to be heard means the right to have evidence considered before the rendition of judgment in contempt. (Ex Parte Dawes 239 P 689, 13 Okla. C. 397).

If due process of law means anything at all, it means "the general law, a law which hears before it condemns; which proceeds upon inquiry and renders judgment only *after trial.....*" (Italics ours) (Daniel Webster in the Dartmouth College Case).

"Due process of law *affords a hearing before it condemns* and gives judgment only *after trial.*" (Italics ours) Wing vs. U. S. 218 U. S. 272.

We have pointed out also hereinabove on page 10 where the Court has confronted counsel for petitioners with the threat to take him into custody or otherwise sternly deal with him. The right to counsel in judicial proceedings is of such ancient origin as not to be open to question. This Court has many times indicated that such denial amounts to a denial of due process of law. To hold before counsel the threat that he will be taken into custody or sternly dealt with, very seriously hampers counsel's ability to adequately represent the interest of his client.

Other instances of denial of due process are pointed out in the petition pages 11 and 13 which we deem requires no further comment.

V.

The Court of Appeals erred in its rulings regarding the matter of privileged communications.

"PRESUMPTION OF CONFIDENTIAL CHARACTER OF COMMUNICATION. Communications between husband and wife *are presumed to be confidential, and one seeking to put them in evidence has the burden of overcoming the presumption.* The fact that acts or words similar to those done or uttered in private occur or are used in the presence of third persons raises no presumption that the presumably confidential character thereof is released." (emphasis ours) (American Jurisprudence, Vol. 58, Page 321).

Petitioner Blau testified that his knowledge of the whereabout of his wife "at present is based on a privileged communication". (R1 - 31, 55).

The Court of Appeals has, in its opinion, stated, "In order, however, to make the communication privileged, it must be of a private and confidential nature, and must have come to one by virtue of the marital relation," and that, "there is nothing in the record indicating that this knowledge ever came to him as *a result of a communication* (R1 - 305) confidential or otherwise." The cases in footnote 2 of the opinion of the Court of Appeals and the record do not support that conclusion. Those cases support the rule that *communications between husband and wife are by implication assumed to be confidential.* See Fraser vs. U. S. infra and Wolfle vs. U. S. infra. The record clearly indicates that petitioner's knowledge of his wife's whereabouts was based on a privileged communication R1 - 31, 53, 55).

At the time these proceedings were had, the public press with glaring headlines and articles were denouncing the petitioners and subjecting them to all sorts of abuse and ridicule. It was a matter of common knowledge that Mrs. Blau was being sought in order to be subjected to interrogation before the grand jury by Mr. H. M. Goldschein, special prosecutor for the government.

She communicated with her husband secretly and confidentially regarding her whereabout, so that he, as her husband, would be reassured as to her safety. *She communicated with her husband solely and only because of the existence of the marital relation between them.* She would have no reason to, and did not disclose her whereabout to others. This is established by the fact that others who knew her were asked about her whereabouts and they did not know (R1 - 110, 111, 120, 123, 159).

From the facts and circumstances surrounding the refusal of petitioner Blau to disclose his wife's whereabouts, no other conclusion can be arrived at except that

the communication was made in confidence and in pursuance of the sacredness of the relationship existing between husband and wife. This is not all that we rely upon, *there is a legal presumption that the communication is confidential.* (American Juris, Vol. 58, Page 321 supra)

Wigmore stated the law thus:

> "It would seem proper to hold that all marital communications are by *implication confidential,* and that the contrary intention must be made to appear by the circumstances of any given instance. Looking at the habits of married persons and the infrequency of express injunctions of secrecy, this implication of confidence seems more consonant with the facts of life. Such is practically the general judicial attitude, in spite of apparent different phrasing. (Wigmore, Vol. 5, 2d Ed. Sec. 2336) (emphasis ours)

In the case of Fraser vs. United States, 145 Fed. 2d 139 cited in the notes to support the decision of the Court of Appeals we find at page 143 the Court saying:

> "*.....All marital communications' are by implication confidential,* and a contrary intention must be made to appear by the circumstances of any given instance. Such is the general judicial attitude....." (Italics ours)

Can it be said that Mrs. Blau, who was being sought in order that she might be subjected to interrogation by Mr. Goldschein before the grand jury, wanted the world to know her whereabouts. Was there any circumstance existing which would overcome the presumption of the confidential nature of the communication. *If there was, the government failed to show it, and the presumption must prevail, as "the one seeking to put them (the commu ica-*

tions) in evidence has the burden of overcoming the presumption." (American Juris supra)

Wolfle vs. United States 54 Sup. Ct. 279, 291 U. S. 7, also cited by the Court of Appeals in the note to the opinion, does not support its finding. The United States Supreme Court said:

> "Communications between the spouses, privately made, are generally *assumed to have been intended to be confidential and hence they are privileged....*" Italics ours)

Regarding this, we call attention to some of the language used by this Court. "The preservation of the marriage relationship" is so essential "as to outweigh the disadvantages to the administration of justice."

In the case of In re Ford's Estate, 261 Pac. 15, another case cited by the Court of Appeals in note 2 the only testimony one of the spouses was permitted to give is where violence was used, and the Court excluded all other testimony. This is clearly indicated by the comment:

> ".....The other incident testified to, however, seems to us to stand on different ground. There was no violence, actual or threatened, no menacing conduct.....and no obscene language...."

The Court of Appeals entirely overlooked the provision of the Colorado law which is here applicable. (First Trust Co. vs. Kansas City Life Ins. Co., 79 Fed. 2d 48)

The Colo. law 35 C. S. A. Chap. 177 Sec. 9 reads as follows:

> "9. *Who may not testify without consent*—— There are particular relations in which it is the policy of the law to encourage confidence and to

preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

First—A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor shall either during the marriage or afterward be without the consent of the other, *examined as to any communications made by one to the other during the marriage;* but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other . . . . .' (Italics ours)

This petitioner would hardly be entitled to the designation of man, had he cringingly disclosed to Mr. Goldschein and the grand jury the confidential communication from his wife in order to save himself from being placed in "durance vile." The law, we trust, as it will be pronounced by this Court, will protect him. For surely the law will not lend itself to make cringing cowards of men by forcing them to betray the confidences placed in them by their wives.

Conclusion

The issues presented herein are of grave portent. At stake are serious constitutional questions involving rights which affect not only these appellants but which will affect all the people. If the government can pry into the minds of the people and uncover their beliefs and associations regarding politics, then it is but a step to inquire regarding religion. When that occurs, we will then find in our midst the very police state which we fought against, and against which American blood was spilled. We call upon this Court to defend and protect the traditional rights and liberties of the people. While the government will contend that the grand jury sought merely informa-

tion, the Constitution reminds us that this information was beyond its reach. In the midst of the current official attack upon "Communism" to which the press bears daily witness, the government has presumed to bend the procedure of the Courts to give a necessary note of legality to its illegitimate purpose. That which entitled our Courts to be described as "havens of refuge for those who might otherwise suffer because they are*******non-conforming victims of prejudice or public excitement" (Chambers vs. Florida, 309 U. S., 277, 84 L. Ed. 716) requires that this Court reject and repudiate such attempted perversion of judicial power, because these are times of public excitement calls for a more careful judicial treatment and greater vigilance against attrition of the foundations of political liberty.

For the reasons given, the Writs of Certiorari should be granted.

Respectfully submitted,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO. 20

JANE ROGERS, *Petitioner,*

vs.

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NO. 21

IRVING BLAU, *Petitioner*

vs.

UNITED STATES OF AMERICA

NO. 22

PATRICIA BLAU, *Petitioner,*

vs.

UNITED STATES OF AMERICA

BRIEF FOR PETITIONERS

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IN THE

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vs.

UNITED STATES OF AMERICA

BRIEF FOR PETITIONERS

Jurisdiction

This Court has jurisdiction pursuant to 28 United States Code Section 1254 (1). The judgment of the Court of Appeals was entered January 5, 1950 (R 306, 307)[1] as to petitioners Jane Rogers and Irving Blau. Rehearing was denied

1. We shall follow the method of designation used by the government in the memorandum on petition for Writs of Certiorari. The volume containing proceedings in No. 635, now No. 20, and 636, now No. 21, shall be designated as "R" and the volume containing proceeding in No. 640, now No. 22, shall be designated as "2R", and folios shall refer to old printing which includes Tracy Roy Rogers record. The number following 2R refers to the page of record in new printing of case No. 22.

on January 28, 1950 (R 322). The judgment as to petitioner Patricia Blau was entered on January 31, 1950 (2R43 folio 119). This Court granted petition for writs of certiorari May 15, 1950. (R 323) (2R43 folio 121).

Opinions Below

The opinion of the Court of Appeals in No. 20 and 21 (R 297) is reported at 179 F 2d 559. The opinion of the Court of Appeals in No. 22 (2R 40 folio 116) is reported at 180 F 2d 103.

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the United States Constitution as it relates to the protection against self-incrimination.

2. The Fifth Amendment to the United States Constitution as it relates to due process of law.

3. The First Amendment to the United States Constitution as it relates to freedom of thought and advocacy, and the right of the Government to compel disclosure of political opinion and association.

4. The Fourth and Fifth Amendments to the United States Constitution dealing with searches and seizures and the privilege against self-incrimination, giving the citizen the right of privacy and silence against any effort to compel disclosure of political associations and beliefs.

5. The Provisions of the 1935 Colorado Statutes Annotated, Chap. 177, Sec. 9:

> "9. *Who may not testify without consent*—There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate;

therefore, a person shall not be examined as a witness in the following cases:

First—A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor shall either during the marriage or afterward be without the consent of the other, *examined as to any communications made by one to the other during the marriage;* but this exception does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by one against the other." (Italics ours)

Specification of Errors

I.

The Court of Appeals erred in ruling that petitioners were in contempt because of refusal to answer questions in a grand jury investigation regarding membership in or connection with other members of the Communist Party, because of claim of privilege against self-incrimination in view of the showing made that members of the Communist Party were indicted in New York on the charge that the Communist Party is "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence.

II.

The Court of Appeals erred in finding that "they (petitioners, Jane Rogers, Irving Blau) could not refuse to answer questions propounded to them concerning third parties when it is clear that such questions could not incriminate themselves," when the showing was that persons associated in the Communist Party were in New York indicted for conspiracy to violate the Smith Act (Secs. 11 and 13, Title 18 U.S.C.).

III.

The Court of Appeals erred when it held that in effect petitioners' refusal to answer questions on the ground that their answers might tend to incriminate them could not be sustained because the answers did not tend to incriminate them within the scope of the grand jury investigation.

IV.

The Court of Appeals erred in sustaining the District Court in adjudging petitioners in contempt for refusal to answer questions before the grand jury, which questions concerned political opinion, activity and association, in that under the First Amendmgnt to the Constitution of the United States freedom of thought and advocacy are absolute and the Government has no right to compulsory disclosure of political opinion and association.

V.

The ruling of the Court of Appeals is in error in view of the Fourth and Fifth Amendments to the Constitution of the United States dealing with searches and seizures and the privilege against self-incrimination which gives the citizen a right to privacy and silence against any effort to compel disclosure of his political associations and beliefs.

VI.

The ruling of the Court of Appeals is in error in that it found that irregularities existed in the proceedings of the trial court, yet failed to deal with said irregularities.

VII.

The Court of Appeals erred in disregarding petitioners' showing that the trial Court denied to petitioners due process of law.

VIII.

The Court of Appeals erred in attributing to certain petitioners who were already sentenced to jail the knowledge of the scope of the grand jury investigation as disclosed by the presentments later filed in reference to other parties.

IX.

The Court of Appeals erred insofar as its ruling concerned petitioner Irving Blau when said ruling appears to hold that communications between spouses must be shown to be privileged.

Questions Presented

1. Whether in a grand jury investigation a witness is justified in refusing to answer questions concerning membership in the Communist Party on the claim of privilege against self-incrimination in view of the fact that indictments were returned in New York City against persons who are alleged to be members of the Communist Party because it is charged in said indictments that said Communist Party is "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."

2. Whether in a grand jury investigation a witness is justified in refusing to answer questions concerning associations and activities in the Communist Party on the claim of privilege against self-incrimination in view of the fact that persons associated in the Communist Party were charged with conspiracy "to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence. . . ."

3. Whether in a grand jury investigation the Government can compel a disclosure of political views, activities and associations in view of the First Amendment to the United States Constitution.

4. Whether the Fourth and Fifth Amendments to the United States Constitution dealing with searches and seizures and the privilege against self-incrimination give the citizen a right of privacy and silence against any effort to compel disclosure of political associaitons and beliefs.

5. Whether in a grand jury investigation a witness is limited in claiming privilege against self-incrimination to matters under investigation or whether the privilege against self-incrimination extends to possible incrimination outside the matter under investigation.

6. Whether the proceeding in the trial court denied to petitioners herein due process of law.

7. Whether the husband may refuse to disclose a communication received from his wife regarding her whereabouts on the ground that the communications between spouses are presumed confidential.

Statement

The petitioners herein were subpoenaed to appear before a Federal Grand Jury in Denver, Colorado and questioned regarding their membership in, activities and associations in the Communist Party.

The purpose of the investigation was never revealed to petitioners when they were witnesses before the grand jury, nor to anyone else connected with these proceedings. It will be noted the Court of Appeals (R 299) (2R 40, 41 Folio 116) refers to the purposes of the grand jury investigation as stated

in the presentments. Yet petitioners Jane Rogers and Irving Blau were found guilty of contempt and sentenced before any presentments were filed.[2] As a matter of fact, the trial court itself did not even know what the purpose of the investigation was at the time petitioners Jane Rogers and Irving Blau were sentenced (R 73). (Presentments were filed only in the three cases which are now moot.) In the case of petitioner Patricia Blau, she was brought before the grand jury on January 4, 1949, no presentment was filed against her and she had no way of knowing the purpose of the grand jury investigation.

Nevertheless, even if the presentments indicate that the grand jury was convened in Denver, as in many places throughout the nation, including Los Angeles (where *Alexander vs. U.S.* 181 Fed. 2d 480 was recently decided) ostensibly for the purpose of ascertaining whether there were any Communists in government employ; if that were the purpose of the inquiry, it was submerged by the true character of the inquiry, as conducted in Denver, and as we understand, elsewhere throughout the country.

The actual aim of the inquiry, as appears from the questioning, appeared to be to ascertain who were the officials and members of the Communist Party in and about Denver. No reason was ever given why such an inquiry should be conducted. Whatever the concealed reason of the government in Denver was, it is a fact that the government has indicted twelve officials of the Communist Party of the United States, for (1) conspiracy to advocate the overthrow of the government by reason of their forming the Communist Party, and (2) their membership in that party. (Since these indictments a trial was had and conviction obtained.)

2. Jane Rogers and Irving Blau were sentenced on September 23, 1948. The presentments against Bary, Kleinbord and Tracy Roy Rogers were dated October 6, 1948.

Two of the petitioners, Irving Blau[3] and Patricia Blau, refused to answer any questions in that connection, claiming the constitutional privilege against self-incrimination (R 30, 31, 53, 54) (2R 7, 10 to 16 folios 79, 82 to 90). See also opinion of Court of Appeals (2R 40, folio 115). Petitioners Irving Blau and Patricia Blau made showings that twelve leaders of the Communist Party were indicted under the Smith Act (2R 27, 28, folios 103, 104). That the attorney general designated the Communist Party to be a subversive organization (R 73). That the Un-American Activities Committee had indicated the Communist Party to be the agent of a foreign power (2R 20, folio 95). These showings were made for the purpose of justifying refusal to answer the questions asked on the constitutional ground that the answers would tend to incriminate said petitioners. That in a joint proceeding involving Jane Rogers and Nancy Wertheimer, held September 22, 1948 (R 38 to 50) the Court's attention was directed to the New York indictments and argument presented thereon. That on the following day in a continuation of the proceeding wherein petitioner Irving Blau also was a party, further showings were sought to be made (R 51 to 81) along that line. There again, considerable argument was had, and the Court recognized that the indictments in New York simply charged membership in the Communist Party to be an offense under the Smith Act (R 80.)

The petitioner Jane Rogers answered some questions, the effect of which established membership in the Communist Party, but refused to answer other questions "on the basis that they would tend to incriminate me" (her) (R 78 to 79).

3. The Court of Appeals erroneously found that "A perusal of his (Irving Blau's) entire examination before the grand jury indicates that it was established by his testimony or his answers that he was a member of the Communist Party." (R 303) A very careful examination of the record fails to disclose any testimony or evidence which would justify that finding. See also note 8, Page 9 of Memorandum for the United States, filed herein on petition for Writs of Certiorari, where the government concedes correctness of our assertion in this respect.

The record discloses that Jane Rogers was brought before the Court on September 21, 1948 (R 38), whereupon it was disclosed to the Court that she had in her possession up until January, 1948, some books and records of the Communist Party. That at the present time (September 21, 1948) she did not have said records and wouldn't disclose who had them.

On September 22, 1948, counsel for Jane Rogers stated to the Court that he believed she would purge herself (R 49). On September 23 she was again brought into Court, where the Government announced that "Mrs. Rogers refuses to answer the questions propounded to her in the grand jury room."

It will be noted that the Court did not bother to determine what questions Jane Rogers now refused to answer and the government made no showing as to the questions she refused to answer (R 77). However, the Court assumed that she would make no changes in her testimony (R 78) and sentenced her to four months in the custody of the attorney general. Irving Blau was sentenced to six months in the custody of the attorney general (R 75) and Patricia Blau received one year (2R 36, 37, folio 112).

The trial court rejected all claim of privilege against self-incrimination under the Fifth Amendment of the Federal Constitution. The Court of Appeals sustained the trial court throughout.[4]

The petitioners also contended that the questions regarding political views and associations were an invasion of petitioners' constitutional rights under the First Amendment. The Court of Appeals entirely disregarded that contention.

4. We should like to point out that in one case, the case of Nancy Wertheimer, the Court of Appeals reversed (R 301). We will deal with that case as it relates to the others in our brief.

as it did contentions regarding Fourth and Fifth Amendments.

The trial court denied petitioners due process of law and the Court of Appeals refused to consider the showings made, except to refer to some irregularities which "leave much to be desired" (R 298). Counsel and petitioner Irving Blau were denied the right to see a transcript of the proceedings upon which the contempt charge against Petitioner Blau was based (R 51 to 53). Petitioner was permitted to consult with his counsel for five minutes, after which petitioner was summarily sentenced without the Court permitting counsel to be heard (R 75). A similar situation occurred in connection with petitioner Jane Rogers (R 77) and petitioner Patricia Blau (2R 5, 6, folio 76). Counsel for petitioners was threatened with being taken into custody, (R 74) with the Court taking sterner measures with him (R 70). That these proceedings were summary without any formal charges or a formal hearing before sentence was imposed.

The record discloses that as to petitioner Irving Blau, the Court refused to accord him the right to claim as privileged a communication received from his wife, and adjudged him in contempt for that reason also.

Summary of Argument

We shall show that under the Fifth Amendment petitioners had a right to refuse to answer questions before a grand jury concerning membership in or connection with the Communist Party on the ground that the answers may tend to incriminate them after they made the showing that members of the Communist Party were indicted for conspiracy to violate certain laws of the United States by reason of membership in said Communist Party. We shall further show that the right to claim the privilege is not limited to the matter under investigation.

We shall show that under the First Amendment to the Constitution of the United States petitioners have the right to freedom of thought and advocacy and the Government cannot compel disclosure of political opinion and association.

We shall show that under the Fourth and Fifth Amendments to the United States Constitution dealing with searches and seizures, the privilege against self-incrimination gives to the citizen the right of privacy and silence against any effort to compel disclosure of his political associations and beliefs.

We shall show that in the trial court there was a denial of due process of law.

That as to petitioner Irving Blau, the Court of Appeals erred on the question of privileged communications between spouses.

Argument

I.

Under the Fifth Amendment Petitioners had the right to refuse to answer questions before the Grand Jury which would tend to involve them for the violation of any laws of the United States. That the privilege against self-incrimination is not limited to matters under investigation.

Under the Fifth Amendment to the Constitution of the United States, "No person . . . shall be compelled in any criminal case to be a witness against himself."

This Court has construed this provision to mean that a witness cannot be compelled in any proceeding to answer questions which would disclose facts tending to show the commission of a criminal offense or any element thereof, or any matter which would constitute a link in a chain of evidence

establishing the commission of an offense, or any facts which would constitute an evidentiary lead to the existence of facts constituting such proof.[5]

The petitioners Irving Blau and Patricia Blau refused to answer any question in connection with their membership, activities, knowledge of and association with the Communist Party. The petitioner Jane Rogers answered questions admitting membership, but refused to answer questions concerning to whom she turned over certain books or other questions showing association in the Communist Party. However, at the time she was sentenced the government made no showing as to the nature of the questions she refused to answer (R 77).

The ground on which the petitioners based their refusal to answer was that they feared the answers might tend to incriminate them (R 77 to 78) (R 53 to 54) (2R 9 to 16, folios 82 to 90).

It is a matter of common knowledge, and the Court was advised that twelve leaders of the Communist Party have been indicted for conspiracy to teach and advocate the overthrow of the government by force and violence based on the principles of Marxism-Leninism. (R 43, 44, 45)

The charge in another indictment contained the following:

> ". . . the defendant herein has been a member of said Communist Party of the United States of America, the defendant well knowing during all said period that said Communist Party of the United States of America was and is a society . . . of persons who teach and advocate the overthrow of the Government of the United States by force and violence." (R 80) (2R 27, folio 103)

5. Counselman vs. Hitchcock 142 U.S. 547, 35 L. Ed. 1110 Ballmann vs. Fagin, 200 U.S. 186, 50 L. Ed. 433.

That the attention of the trial court was directed to the existence of said indictment is established by the record, and the trial judge recognized the purport of the New York indictments when he said:

> "This indictment, Mr. Menin, is for violation of Sections 10 and 13 of Title 18 of the United States Code, *and the charge simply is that the defendant is a member of the Communist Party.*" (R 80) (Italics ours)

While it is true that at the time the remark was made the judge just got through sentencing Nancy Wertheimer, it was made at a time when Irving Blau and Jane Rogers were in Court with her in a joint proceeding at which time they were also sentenced. In other words, Jane Rogers, Irving Blau and Nancy Wertheimer[6] were all sentenced to jail for contempt for refusal to answer regarding Communist membership, activities or association at a time when the judge knew that people were indicted simply and solely because of their membership in the Communist Party.

Certainly it must have been apparent to the trial court and to the Court of Appeals that the constitutional guarantee against self-incrimination protected these petitioners against answering questions which answers could well provide the basis for a prosecution against them similar to the prosecution which took place in New York.

In the Patricia Blau case the indictments in New York were again called to the Court's attention and introduced in evidence (2R 10, folio 82) (2R 27, 28, folios 103, 104).

The petitioners had further reason to fear prosecution because of the designation of the Communist Party as subversive by the attorney general and because of the findings of the

6. The Wertheimer case having been reversed by the Court of Appeals (R 303) is not before this Court.

Un-American Activities Committee, as well as the loyalty order (R 73) (2R 21, folio 95).

Petitioners were, therefore, well within their rights in refusing to answer questions which would tend to establish that they are members of the Communist Party or would tend to show that as members what their activities were and with whom they were associated in said Communist Party. The fact already was before the Court, and the Court already indicated it knew that people were indicted because of their membership in the Communist Party (R 80).

The earliest pronouncement of the law on this subject in this country came from Chief Justice Marshall in the *United States vs. Burr (In re Willie)* 25 Fed. cases 38 where he set forth the principles that it is for the Court to decide whether there is a possibility of incrimination; if there appears to be such a possibility, it is for the witness alone to decide whether the answer would tend to incriminate him; in determining whether the possibility of incrimination exists, it is *not necessary* to find that the answer might directly tend to establish an element of the crime; *it is sufficient if it appears that the answer might constitute a link in a chain of evidence* to afford the government the means of proving a fact with respect to the alleged crime.

This court in *Counselman vs. Hitchcock*, 142 U.S. 547, 35 L. Ed. 1110, made an exhaustive review of the law in that respect. There a grand jury was investigating violations of a statute regulating rail oad rates. The witness refused to answer when asked whether he knew of the practice of others in giving or receiving reduced rates or rebates. The Court among other things said:

> "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prose-

cution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself committed a crime. The privilege is limited to criminal matters, but is as broad as the mischief against which it seeks to guard."

It was also there contended that the claim of privilege by the witness was unfounded because of an immunity statute, which in effect prevented evidence given under compulsion to be used against him in any proceedings to convict him of a crime of exact a penalty. The Court held that the immunity statute was no substitute for the privilege, since it did not prevent the testimony from being used as evidentiary leads to disclose other facts or witnesses which might be used against him.

". . . It (the immunity statute) could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." *(Counselman vs. Hitchcock supra).*

The only time a witness may be compelled to answer exists where the immunity statute forecloses any and all prosecution with reference to any transaction, matter or thing concerning which the witness testifies. In such case the witness must testify notwithstanding the criminating nature of his answer because the immunity statute satisfies the basic reason for the privilege and cannot possibly be used as a basis for or

in aid of, a criminal prosecution against the witness. The immunity statute must in effect be a "general amnesty" available to the witness. (*Brown vs. Walker* 161 U.S. 591, 40 L. Ed. 819). This situation did not obtain in the *Counselman* case, and, of course, does not obtain in the present case.

Again in *Counselman vs. Hitchcock*, the Court referred to and adopts the language of the *Burr* case *supra:*

> "In June, 1807, Chief Justice Marshall, in the Circuit Court of the United States for the District of Virginia, in *Burr's trial*, (1 Burr's Tr. 244) on the question whether the witness was privileged not to accuse himself, said: "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be to answer the question or not. If in such a case, he say, upon his oath that his answer would criminate himself, the Court can demand no other testimony of the fact. * * * According to their statement, (the counsel for the United States) a witness can never refuse to answer any question, unless that answer unconnected with other testimony, would be sufficient to convict him of crime. *This would be rendering the rule almost perfectly worthless.* Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact, of itself, might be unavailing, but all other facts without it would be insufficient. While

> that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. That testimony may be possessed or is attainable against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

The finding of the Court of Appeals that "they (petitioners) could not refuse to answer questions propounded to them concerning third parties when it is clear that such questions could not incriminate themselves" (R 305) is clearly erroneous in the light of the showing made. Those third parties may well be the associates without which information a conspiracy charge could not be founded. Likewise, the Court of Appeals erroneously held that petitioners

> ". . . voluntarily answered at least one question showing membership in, or a connection with such Party before they refused to answer further on the ground that their answer might tend to incriminate themselves. By doing so, they waived the privilege that was theirs under the constitution and were thereafter required to answer the remaining questions propounded to them" (R 304).[7]

First because petitioner Irving Blau did not answer any questions,[8] and secondly, if it should be intended to apply to Jane Rogers because it appears she admitted membership, it must be remembered that answing additional questions such as to whom she gave the books, would connect her up with

7. This decision applies only to petitioners Jane Rogers and Irving Blau.

8. See Note 3, Page 8 hereof.

others in the Communist Party and could lead to an indictment for conspiracy. Thus, even if she was already subject to an individual charge, she could not be compelled to further incriminate herself by having forced from her answers which would tend to lay the foundation for a charge of conspiracy.

Likewise, any questions concerning affiliation, knowledge or activity in the Communist Party could give rise to charges such as were filed in New York.

In the Ninth Circuit where *Alexander vs. United States* 181 Federal 2d 480, was recently decided, the government pursued the same course it did in Denver. In fact, Mr. Max Goldschein, special assistant to the attorney general who instituted the proceedings in Denver, also instituted the proceedings in Los Angeles, and the Court of Appeals there said at page 485:

> "It is apparent that knowledge of a 'table of organization' or 'the duties of a Party' (hence its 'county officers') seeking the overthrow of the government by force necessarily would be secret. Such law-defying conspirators do not circulate through the community, telling how they are organized for such a purpose and the duties of those directing such action.
>
> If any of the appellants be indicted for affiliation with or membership in the Los Angeles Communist Party as an organization either teaching or seeking the overthrow of the government by force, it well may be upon the prosecution to show the defendants' knowledge of the necessarily secret 'table of organization' or 'the duties' of such a Party. To answer, 'Yes, I know their table of organization', or 'I know the duties of the Party' would be an impugning supplying of the fact of his 'knowing the purposes thereof' which is one of the essential

factors in the crimes created by the Smith Act, supra.

Such an answer 'might tend to show that he himself had committed a crime' and is much more than giving testimony which would be of use 'to search out other testimony to be used in evidence against him' as in the Supreme Court's restatement of the principles of *Counselman vs. Hitchcock*, 142 U.S. 547, 12 S. Ct. 195, 198, 35 L. Ed. 1110, controlling the decisions in *Arndstein vs. McCarthy*, 254 U.S. 71, 73, 41 S. Ct. 26, 65 L. Ed. 138. In the latter case, succeeding *Mason v. United States, infra*, the Supreme Court said:

'No person * * * shall be compelled in any criminal case to be a witness against himself'. Fifth Amendment. 'This provision must have a broad construction in favor of the right which it was intended to secure.' 'The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.' *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S. Ct. 195, 197, 35 L. Ed. 1110.

'The protection of the Constitution was not removed by the provision in Section 7 of the Bankruptcy Act [11 U.S.C.A. §25]: 'No testimony given by him shall be offered in evidence against him in any criminal proceeding.' 'It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property.' *Counselman v. Hitchcock*, 142 U.S. 564, 12 S. Ct. page 198, 35 L. Ed. 1110."

* * * * *

And at page 486:

"Learned Hand's opinion in *United States v. Weisman*, 2 Cir., 111 F. 2d 260, 261, reversing the lower court, deals

with an identical problem. There the question on which the witness claimed privilege was, 'Did he know anyone who visited, lived in, or stayed at Shanghai in the years 1934 to 1939?' As here, this question is innocuous on its face. As here, the witness showed a reasonable anticipation that he might be indicted for conspiracy to import narcotic drugs from Shanghai, just as exists a conspiracy indictment in New York and the Attorney General's likelihood to indict for conspiracy in Los Angeles.

Similarly, the opinion of Augustus Hand in *United States v. Zwillman*, 2 Cir., 108 F. 2d 802, where the apparently innocuous questions as to who were the witness' business associates in certain years was held likely to impugn him with reference to reasonably anticipated prosecution for a conspiracy to violate the liquor laws. The witness was prevented from showing that this answer might tend to incriminate him. There the district court again was reversed. See also the similar holding in *United States v. Rosen*, 2 Cir., 174 F. 2d, 187, 192."

This Court, in the case of *Ballmann vs. Fagin* 200 U.S. 186, 50 L. Ed. 433, likewise applied the rule of privilege in a case which arose out of a grand jury investigation of criminal liability of some employee of a national bank where large sums of money disappeared. The grand jury asked a witness to produce his cash book, he refused and was then asked questions "the manifest meaning of which was to fasten upon him an admission that there was a cash book." He likewise refused to answer. In a contempt hearing, he offered to show that there were actions pending against him and others charging them with conducting a scheme of gambling known as "bucket shop." The trial court was reversed on its finding of contempt.

The Court recognized that a cash book, if the witness kept

one, would likely disclose either receipt of missing cash or participation in bucket shop activities. From this alone with nothing more, this Court held the witness was entitled to claim privilege in connection with the demand to produce the book as well as questions designed to establish its existence. The decision is of special significance in that it reaffirms the extension of the privilege not only to prove a criminal offense, but also to questions designed to obtain evidentiary leads, leading to such proof.

In holding that the *possible* contents of the cash book, in the light of the investigation, disclosed sufficient cause for a claim of privilege against production of the cash book, this Court in *Ballmann vs. Fagin* said:

> "• • • The book very possibly may have disclosed dealings with the person or persons naturally suspected, and, especially in view of the charges that Ballmann kept a 'bucket shop', dealings of a nature likely lead to a charge that Ballmann was an abettor of the guilty man. If he was, he was guilty of a misdemeanor under Rev. Stat. Sec. 5209, U.S. Comp. Stat. 1901, P. 3497 and no more bound to produce the book than to give testimony to the facts which it disclosed," (Citing *Boyd vs. U.S.* 116 U.S. 616, 29 L. Ed. 746; *Counselman vs. Hitchcock*, supra).

It is clear that the Court's holding rests on the proposition that answers to these questions might provide the government with evidentiary leads through which they might obtain the cash book or its contents. It is equally apparent that in reaching this result in *Ballmann vs. Fagin* this Court recognized the established principle of law:

> "• • • And without any inclination to enlarge a witness's right beyond the *settled requirements of law*, we think that the privilege might extend to any question, the

manifest object of which was to prove possession or control as a preliminary to calling for the book." (Italic ours)

The scope of the privilege defined by these cases has never been reduced, *Arndstein vs. McCarthy*, 254 U.S 71, 65 L. Ed. 138; *United States vs. Weisman* 111 Fed. 2d 260; *United States vs. Zwillman* 108 Fed. 2d 802; *United States vs. Cusson*, 132 Fed. 2d 413; *Foot vs. Buchanan* 113 Fed. 156.

In the very recent case of *Estes vs. Potter, et al*, decided in the Fifth Circuit on August 5, 1950 while this brief is being written, the Court of Appeals there said:

"Appellant was asked whether he personally knew the alien; if he knew whether said alien was a member of the Communist party; if he knew whether the alien contributed funds to the Communist party; if he knew whether the alien attended meetings of the Communist party, etc. He could hardly know whether the alien attended meetings without being present there in person, and evidence of appellant attending such meetings would tend to show that he was a Communist. Appellant was not asked concerning things that he might have heard or been told. He was not asked if he knew the alien's reputation for communistic activities. The distinction is a significant one. *He could not know the crucial things that he was asked about without furnishing a link in the chain of evidence that might be needed to convict him under the New Criminal Code, 18 U.S.C. 2385 or 18 U.S.C. 371.* If affiliation with the Communist Party is sufficient ground for deportation of an alien for the reasons urged, it is a reasonable ground for a citizen to fear a prosecution for conspiracy. If the appellant denies that he is a Communist, he may be prosecuted for perjury; if he admits it he may be prosecuted for belonging to a group that encourages the overthrow of governments by force; if he declines to do either, he is liable to

spend a long time in jail, when (he) ought to be a free man." This is a perilous position for a citizen, who is presumed to be innocent unless the facts here are sufficient to adjudge him guilty of contempt." (Italics ours)

Of course we realize that the application of the privilege must of necessity turn on the specific facts developed in each case.

Questions which on their face appear to be such that the answer might tend to incriminate, in that the answer in and of itself might tend to establish an element of the crime, are, of course, privileged. *(Counselman vs. Hitchcock, supra; Foot vs. Buchanan supra).* The witness in such a situation may claim the privilege without the necessity of any further showing of the danger to him. The questions involved in the cases at bar directly tend to incriminate petitioners in the sense that the answers in and of themselves might tend to establish that *association* which constitutes one of the basic elements of the crime defined by the Smith Act.

In any event, even if it should not appear that the answer would tend to incriminate without a further showing, that showing was here made and the privilege claimed. In order to claim a privilege, the witnesses need only show:

(a) That the danger is real and that there is reasonable risk of prosecution. This is established by *showing prosecution of others* with whom the witness is connected, or by threats of prosecution among whom the witness may be included *(United States vs. Weisman supra; United States vs. Zwillman supra; Alexander vs. United States supra).*

(b) That the answer to the question may constitute a link in a chain utilized to establish guilt, or that it may furnish an evidentiary lead assisting the government in obtaining the proof necessary to establish its case.

Once the danger is indicated, there must be great liberality in favor of the witness in determining whether the answer might constitute a link in a chain of evidence, or evidentiary lead.

Regina vs. Boyes, 1 Best and S. 311, 329.

Foot vs. Buchanan, 113 Fed. 156, 160-1.

The reality of the danger was called to the Court's attention below. They showed that members of the Communist Party were indicted because of membership, both individually and for conspiracy (R 43 to 45, 49, 80) (2R 8, 9, 17, 27, 28, folios 80, 81, 91, 103 & 104). The Court recognized the fact that the indictments charged simply membership in the Communist Party (R 80). When this was called to the Court's attention in the Patricia Blau case (2R 9, folio 81) the Court remarked, "They haven't been convicted, have they—"[9]

We submit the showing made was no imaginary or unsubstantial danger. Once the government can obtain an admission of membership or of association with the Communist Party from these petitioners, prosecution can be initiated as has been done in New York.[5] If it can obtain only an evidentiary lead "the chase", in the words of Judge Learned Hand, will get "too hot" and the "scent too fresh." (*United States vs. Weisman, supra*). But this is not a game of fox and hounds; we are dealing with citizens of these United States and the Federal Constitution which embodies the basic law of the land. The limitation on governmental powers prescribed by the Fifth Amendment must be given full effect. In *United States vs. Weisman supra* the Court went on to say:

> "* * * All crimes are composed of definite elements and nobody supposes that the privilege is confined to answers which directly admit one of these; it covers also

9. Since that time convictions have been obtained in New York.

such as logically, though mediately, lead to any of them; such as are rungs of the rational ladder by which they may be reached. A witness would, for example, be privileged from answering whether he left his home with a burglar's jimmy in his pocket, though that is no part of the crime of burglary."

Thus, again the Court recognized that acts which of themselves may be perfectly innocent, may constitute a link in a chain of evidence establishing guilt or point to the existence of such evidence. In such cases a witness need not testify concerning the apparently innocent acts.

The Court then went on to say that the "setting" established by the witness indicated that others were being charged with a conspiracy and that the answers to questions which were asked might tie him in with those other persons:

> "• • • These things made it perilous for him to answer; if he had acknowledged such acquaintances it would probably have directly connected him with the principals in the conspiracy." *United States vs. Weisman, supra.*

On this point the *Weisman* case is so close to the case at bar as to be controlling. There the showing was a prosecution for conspiracy to violate the narcotics laws. Here the showing made is that the Communist Party is charged with conspiracy to violate the Smith Act. There the question was "Do you know persons who visited, lived in or stayed at Shanghai in the years 1934 to 1939?" The question on its face appears to be proper, however it was held likely to refer to narcotic conspirators because of the showing. Here the questions asked deal with membership, officers, table of organization of the Communist Party, associations, membership lists, books, etc. All at a time when according to the showing of petitioners that members of the Communist Party are charged with conspiracy under the laws of the United States.

Not only did we make the showing as previously indicated, but the Court actually recognized that people were being prosecuted simply and solely for being Communists and so stated (R 80)!

In the *United States vs. Zwillman supra*, a grand jury was investigating an alleged conspiracy "to commit any offense against the United States or to defraud the United States in any manner or for any purpose." The witness was asked who his business associates were in the years 1928 to 1932. The witness attempted to show, but was prevented by the trial court, that the grand jury had evidence that witness was engaged in liquor business during those years, that he was under investigation for income tax violations, that there had been testimony in another case to the effect that witness and others were engaged in illegal liquor activities in the years other than those referred to in the questions. Counsel for Zwillman stated to the Court that Zwillman had been in the liquor business up to 1933.

> "* * * Evidence necessary to show that defendant was engaged in a conspiracy during the years 1928 to 1932 might well be supplied by proof of the names of business associates engaged in violating the laws relating to the manufacture or sale of liquor. * * *"

Here again we see as in the *Weisman* case are involved questions concerning association which would tend to establish a conspiracy to violate the laws of the United States. In the *Weisman* case it was a conspiracy to violate the Narcotics Act. In the *Zwillman* case it was a conspiracy to violate "the laws relating to the manufacture or sale of liquor." In the case at bar it's the conspiracy to violate the Smith Act. In any event, in the case at bar the questions were such that the answers could well furnish "a link in the chain of incrimi-

nating testimony" *(United States vs. Zwillman supra; Counselman vs. Hitchcock supra).*

Likewise in the case of *United States vs. Cusson* 132 Fed 2d 413 the Court passed on a similar question of association. The witness was asked whether on a visit to Philadelphia in February 1942, she had "met with any of the Groveses." In support of her claim for privilege she showed that two men named Groves had been tried under an indictment in New York; that she went to Mexico before the trial and returned after its close; that although she had not been subpoenaed for trial, government counsel asked her if she had been, just before calling her before the grand jury. On this showing she claimed *possible* incrimination because her answer "might serve as a link in establishing that they told her to go to Mexico so as to avoid being called as a witness upon their trial and that this would tend to prove that she had conspired with them to obstruct justice."

> "• • • the question put to her by the prosecutor followed by the effort before the Grand Jury to learn whether she had talked with the Groveses just before their trial, *in our judgment laid a warm enough scent to make its pursuit genuinely perilous to her." (Italics* ours.)

This case strikingly illustrates the approach laid down in *Regina vs. Boyes supra,* that where the danger is shown to be real "great latitude should be allowed to him in judging for himself the effects of any particular question."

Again quoting from the very recent case of *Estes vs. Potter, et al,* the Fifth Circuit Court said:

> "The questions propounded to appellant do not disclose the incriminatory nature of the answers sought to be elicited, but appellant does not have to prove that his

answers would incriminate him to be entitled to his privilege. If that were the nature of the burden, he would be forced to divulge the very facts that the immunity permits him to suppress. *A witness need only show that his answers are likely to be dangerous to him.* If in the circumstances it is reasonable to infer the possibility of incrimination from the answers that the witness may give, the privilege may be claimed. It is for the court to determine, in the first instance, whether incrimination is reasonably possible from any answer the witness may give; *but if such possibility exists, then the witness has the abolute right to assert his privilege,* which extends to more than the admission of a crime or any element thereof . . . . . " (Italics ours)

Certainly, the trial court knew there was a possibility of prosecution, because the Court recognized that persons were being prosecuted solely because they were members of the Communist Party (R 80).

We are not unaware of the rulings in *Mason vs. United States* 244 U.S. 326, 61 L. Ed. 1198; *Camarota vs. United States,* 111 Fed. 2d 243; *United States vs. Flegenheimer* 82 Fed. 2d 751 and *United States vs. Weinberg* 65 Fed. 2d 394.

An examination of these cases discloses that the claim of privilege was denied because *the witness failed to establish any setting.* This is also indicated by *Alexander vs. U.S. supra.*

In the Mason case the questions asked concerned whether witness saw games of cards played at a certain time and place. *No showing by the witness was made as to how these questions might incriminate him.* In sustaining the lower court this Court indicates that it is following the *Burr* case, *supra,* which as we have above indicated, established the proposition that answers to questions may be incriminating where they constitute a link in a chain or furnish an evidentiary lead. This

Court also cited *Brown vs. Walker* 161 U.S. 591, 40 L. Ed. 819 which lays down the rule that the privilege extends to evidence which may possibly "be used as a basis for, or in aid of, a criminal prosecution against the witness."

Also in that case there is quoted at length from *Regina vs. Boyes, supra,* as laying down the correct rule. *Regina vs. Boyes* holds that a showing must be made so that the Court can see "from the circumstances of the case and the nature of the evidence which the witness is compelled to give, *that there is reasonable ground to apprehend danger to the witness* from his being compelled to answer."

The point in the *Mason* case is that the witness failed to make a showing of danger. In the *Weisman, Zwillman* and *Cusson* cases *supra,* such a showing was made. In the cases at bar such showing was made.

The *Camarota* case, *supra,* likewise failed to show a possibility of incrimination under federal law. The witness asserted he feared incrimination for violation of federal income tax laws. Although the opinion does not set forth, it appears that the answers had a tendency to incriminate under the state gambling laws. The privilege in a federal proceeding does not extend to incrimination under state laws. *(United States vs. Murdock* 248 U.S. 141, 76 L. Ed. 210). The fact that the Court relied on the Mason case also indicates failure to establish the setting showing possible violation of federal law.

In the *United States vs. Flegenheimer, supra,* a similar situation existed although Flegenheimer was charged with income tax evasion, the government claimed that this was accomplished in a part through a bank account which he maintained under a fictitious name of Harmon, jointly with a man named Di Larmi. Di Larmi was called as a witness and asked whether he knew Harmon. He refused to answer but made absolutely

no showing as to danger to himself. However the ruling in the *Flegenheimer* case is in extreme doubt. It was cited only once in *In re Weisman* 31 Fed. Sup. 190. The *Weisman* case was later reversed on appeal, *United States vs. Weisman* 111 Fed. 2d 260. There was no review of the *Flegenheimer* case by this Court. The case is in conflict with *Ballmann vs. Fagin supra*, above discussed.

The case of *United States vs. Weinberg, supra*, simply follows *Brown vs. Walker, supra*, holding the immunity statute is adequate if it is co-extensive with the constitutional privilege.

We contend therefore that where as here a sufficient showing is made of the possible danger, the witness need not go on and "show how the incrimination might occur. To do so might make the privilege valueless." *Russell vs. United States* 12 F. 2d 683. (Cert. denied 273 U. S. 708, 71 L. Ed. 851).

On June 29, 1947, in the matter of *In Re Emil Costello*, the District Court of the United States for the District of Columbia, (an unreported case) the following opinion was handed down:

> "THE COURT (Pine, J.): I have before me the question of the constitutional safeguard against self-incrimination. The case that is cited time and again by all the authorities and by the Supreme Court of the United States is the case of the *United States vs. Aaron Burr*, and in that case Chief Justice Marshall has this to say about this provision of the Constitution:
>
> 'When a question is propounded (a question which the witness declines to answer upon the ground that it may tend to criminate him), it belongs to the Court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it

may criminate himself, then he must be the sole judge what his answer would be. The Court cannot participate with him in this judgment because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily, then, from this statement of things, that if the question be of such a description that an answer may or may not criminate the witness, according to the purport of that answer it must rest with himself who alone can tell what it would be, to answer the question or not. If, in such a case he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact.'

That case was cited in *Councilman vs. Hitchcock* and more recently in *Mason vs. United States*, both in the Supreme Court of the United States.

Therefore, following that decision, I have before me the decision to determine whether the answer may or may not criminate him. If it is a question of such a description that the answer may or may not criminate him, it must rest with the witness, and if, in such a case, the witness say upon his oath that his answer could criminate him, the court can demand no other testimony of the fact.

In this case the defendant has refused to answer the question whether he is a member of the Communist Party and the question whether he has attended certain meetings of the Communist Party, all of which would go back to the basic question of whether he is a member of the Communist Party.

In view of his testimony, I am of the opinion that this question is of such a description that the answer may or

may not criminate the witness. Having said that upon his oath that it would criminate him, I can demand no further testimony of the fact.

It is more important, in my opinion, that these constitutional safeguards be preserved for all the people all the time, than that the Government be permitted to pursue this particular line of inquiry in this particular investigation. Accordingly, the proceedings will be dismissed, the grand jury will return to the grand jury room and resume their labor, the witness will return to the grand jury room, if counsel for the Government wish to ask him further questions. I return the transcript to counsel." (Italics ours).

It will be noted in the *Costello* case the only showing required by the Court was the statement under oath that the answer would incriminate. That case and the *Alexander* case *supra*, are especially significant because they are almost exactly in point with the case at bar and because in both those cases the refusal to answer questions before the grand jury was found not to constitute contempt in one instance by the trial court and in the other by the appellate tribunal.

The Court of Appeals reversed the Wertheimer conviction on the theory that she might have been a government employee and have previously under oath answered the question as to whether she was a Communist in a way that might now subject her to a perjury charge. (R 301, 302) But the protection of the Fifth Amendment is broader than this. The refusal of a witness to answer cannot depend solely upon whether he had ever been a government employee. Questions asked in an investigation presumably related to one subject may open the door to or constitute a link in the chain leading to the prosecution of the witness for alleged violations wholly outside the grand jury investigation. *(U.S. vs. Rosen* 147

Fed. 2d 187, *Counselman vs. Hitchcock* 142 U.S. 547, *Alexander vs. United States* 181 Fed. 2d 480.)

One may, of course, refuse to answer questions which tend to establish the commission of an offense of the matter under investigation on the ground of privilege against self-incrimination. But the constitutional privilege against self-incrimination is not limited to the matters under investigation alone. A witness is privileged against answer:

> "If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of *any crime*." (Emphasis ours) *(Burr vs. United States*, 25 Fed. Cases 14, 692e)

The Court of Appeals was, therefore, clearly in error in limiting the privilege to the matter under investigation as it did in the decisions here being considered. (R 297 at 302-304) (2R 40 at 42, folio 118). The significant thing is that the Court of Appeals actually cited the quotation from *Burr vs. the United States*. The Court of Appeals cited the correct rule of law, but didn't apply it.

As heretofore pointed out in the case of *Alexander vs. U.S. supra*, the facts were almost identical. As previously indicated, Mr. Goldschein, the special assistant to the Attorney General, who prosecuted the cases in Denver, then went to Los Angeles and there he employed the same tactics.

Further, the Court of Appeals in the footnote to its opinion refers to the case of *Schneiderman vs. United States* 320 U.S. 118 (2R 42, folio 118) to show that it is not a crime to be a Communist. We agree it is not a crime to be a Communist, but the fact is that Communists were being prosecuted under the Smith Act. In the *Alexander* case Mr. Goldschein ad-

vanced the same argument and the court there said at 181 Fed. 2d 480 at 483:

> "The principal argument made by the government is that such questions as to the membership and organizational setup of the Communist Party of Los Angeles could not possibly incriminate the appellants on a charge of such membership or affiliation with such members because of the decision of the Supreme Court in *Schneiderman v. United States*, 320 U.S. 118, 63 S. Ct. 1332, 87 L. Ed. 1796.
>
> This is an extraordinary argument. The *Schneiderman* case decided that the evidence before it *was insufficient to show* the Communist Party advocated the overthrow of the government by force. * * * * *
>
> * * * * *
>
> We do not agree that, because of the Schneiderman decision in 1943, in 1948 the branch of the Communist Party in Los Angeles could not possibly be composed of persons organized in violation of the Smith Act to overthrow the government by force or to teach such overthrow or composed of persons affiliating with such an organization.

The pertinent portion of the Smith Act, 18 U.S.C.A. 2385 is:

> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any society, group, or assembly of persons, knowing the purposes thereof * * *."

Circuit Judge Pope, in a concurring opinion in *Alexander vs. U.S. supra*, put it thusly at page 487:

> "I concur in the result reached but not in some of the things said in the opinion of Judge Denman, in which two of the other members of the court have joined. The Smith Act provides that under certain circumstances membership in, or affiliation with a group of the kind described in the Act is in itself one of the elements of a crime. I think, therefore, *that the proof that indictments based on this very section of the Act charging violation by virtue of membership in the Communist Party were pending in New York*, was sufficient to make the showing of reasonable *ground to apprehend danger under the rule* in *United States v. Burr*, Fed. Case. No. 14, 692e, *United States v. Mason*, 244 U.S. 362, 37 S. Ct. 621, 61 L. Ed. 1198, and *United States v. Rosen*, 2 Cir. 174 Fed. 2d 187, certiorari denied 338 U.S. 851, 70 S. 87." (Italics ours)

It will be noted in the cases at bar the Court of Appeals refers to the presentments (R 299, 301, 302, 304) (2R 40, 41, folio 116). Presentments were filed only in the Bary, Kleinbord and Tracy Roy Rogers cases (R 86, 97) (2R 41, folio 116) wherein the government stated that the purpose of the grand jury investigation was:

> ". . . an inquiry concerning various employees of the United States Government who had allegedly made false statements in connection with their loyalty investigation in violation of Section 80, Title 18 U.S.C. and other criminal laws of the United States." (R 86, 97)

Yet, the Court of Appeals points out that "There is much in the record warranting the conclusion that the purpose of the investigation by Mr. Goldschein, the Government's Special Representative, before the grand jury was to unearth the activities of the Communist Party of Colorado, rather than

to unearth violations of 18 U.S.C., Paragraph 80 as stated in the presentments." (R 299)

We say that the Government actually was engaged "in a nation-wide prosecution against Communists", and in support of this assertion we call attention to the supplement to the opinion by Chief Judge Denman of the Ninth Circuit:[10]

"DENMAN, Chief Judge, individually supplementing the court's opinion: In connection with the selective character of the group of appellants, as well as in connection with the assurances of the Assistant Attorney General to each of those so selected and to those of the Tenth Circuit, that he was not under investigation by the grand jury, the following portion of a published press release of the Department of Justice, dated June 15, 1949, describes the cases pending in this court as a part of the 'prosecution' * * * against communists in the United States':

'Prosecution action in the courts *against communist* in the United States was as follows:

* * *

'Sixteen *alleged communists* have been convicted in California on charges of civil contempt for refusing to testify before a Federal Grand Jury. Fifteen are out on bail, pending appeal to higher courts, and one was fined and paid $2500 for refusing to answer subpoena, thereby obstructing justice. He will be summoned to appear before the Grand Jury again. *Conviction of 10 of these 16 has been affirmed by the 9th Circuit Court of Appeals in San Francisco.* The appeals of the other 5 to the Circuit Court are pending.

'Seven *alleged communists* were convicted in Denver,

10. Alexander v. United States, 181 Fed. 2d 480 at 486.

Colorado, on charges of contempt for refusing to testify before the Federal Grand Jury in connection with the investigation of the alleged disloyalty of a government employee. They are out on bond pending an appeal to the Circuit Court.' (Emphasis supplied).

This press release was followed by a similar characterization of the cases pending here by the then Attorney General in a statement, published by him in his official capacity, giving his opinion of the accomplishments of his department against the 'alleged communists', the judgments against whom are here reversed. His opinion is,

'The Department of Justice can point to a record of real *accomplishment against subversives in our midst.*
• • •

'Eleven top-flight Communists have been brought to trial in New York. William Z. Foster, the head of the Communist Party, is sick and awaiting trial.

'Thirty-four *alleged Communists* have been convicted in Washington for contempt of Congress.

'Twenty-five *alleged Communists* have been convicted in California on charges of civil contempt for refusing to testify before a Federal Grand Jury.

'Seven *alleged Communists* have been convicted in *Denver, Colorado,* on charges of civil contempt for refusing to testify before a Federal Grand Jury.' (Emphasis supplied)

Of course, neither the Attorney General in publishing his opinion (in the Magazine 'Look' on August 30, 1949), nor the Solicitor General directly in charge of the cases could have known of the assurances given by their Assistant Attorney General to the appellants here and those

in Denver, Colorado, to the effect that their examination was not aimed at them to promote a 'real accomplishment against subversives in our midst.'

* * *

The public report of the Department of Justice shows that, whether 'poor people' or rich people, all the appellnats, as a group, were selected by the prosecution to testify before the grand jury as 'alleged Communists' in a nationwide prosecution against Communists."

Thus, it appears from the press release issued by the Department of Justice as disclosed in Judge Denman's supplement, that the petitioners " (appellants) , as a group, were selected by the prosecution to testify before the grand jury as 'alleged communists' *in a nation-wide prosecution against Communists.*" Likewise, it appeared that Mr. Goldschein's purpose as indicated by the Court of Appeals "was to unearth the activities of the Communist Party of Colorado" (R 299).

If these petitioners were being prosecuted as Communists, as the publicly announced purpose by the Department of Justice indicates, as well as appeared from the activities of Mr. Goldschein, were they not within their rights under the Federal Constitution in refusing to give testimony regarding their activities and associations in the Communist Party? If the Government's announced purpose was to prosecute Communists, had these petitioners admitted their membership, their activities and their associations, they could have been subjected to prosecution on the evidence they gave, or at least on the evidence which would have been uncovered on the leads logically flowing from the evidence given. Since they refused to so incriminate themselves, are they now to be imprisoned for contempt? It was never the intention of the framers of our Constitution to put in the hands of our Government a two-edged sword where the Government could im-

prison people for refusing to answer questions and also to charge those same people with crimes and subject them to possible imprisonment if they do answer the questions.

In that respect, we call this Court's attention again to the recent case of *Estes vs. Potter et al, supra:*

> "If the appellant denies that he is a Communist, he may be prosecuted for perjury; if he admits it, he may be prosecuted for belonging to a group that encourages the overthrow of governments by force; if he declines to do either, he is liable to spend a long time in jail, when (he) ought to be a free man.' *This is a perilous position for a citizen, who is presumed to be innocent unless the facts here are sufficient to adjudge him guilty of contempt.*" (Italics ours).

The Bill of Rights, more particularly the Fifth Amendment, must be read in the terms of pre-revolutionary American and British law with all the content of the struggle of those times. In the unceasing struggle between the people and their government, the Fifth Amendment was another warning to the government not to encroach upon an area reserved to the people. The protection against self-incrimination is not the development of modern criminal law. It is the result of a course of experience in which men had to conform in religion and politics, and such conformity was enforced through compulsory disclosures.

The Government has ample power to prevent and punish crime, but this power is not to be misused. The Fifth Amendment is a means of safeguarding the citizen against government oppression. The government may not compel any person to testify against himself, to brand himself, to confess heresy. That idea must ever be kept in mind in determining the effect and purpose of the Fifth Amendment. The shortest

step in the direction of curtailing any right "must be halted *in limine*, lest it serve as a precedent for further advances in the same direction or for wrongful invasions of others." Sutherland J. *Jones vs. Securities and Exchange Commission* 298 U.S. 1, 80 L. Ed. 1015.

The Attorney General of the United States, in office at the time, determined to pursue a policy of *prosecuting Communists*. He had brought indictments to that end in New York. Under these circumstancees, we submit that he cannot compel testimony from potential victims, testimony which would in itself be incriminating or would supply the evidentiary lead which could then be pursued by the government, leading to indictments in Colorado. The Department of Justice pursued a two-faced policy when it said it is a crime to be a Communist in New York and not a crime to be one in Colorado. While we contend it is not criminal to be a Communist anywhere in the United States, nevertheless it is the Department of Justice that institutes the proceedings and having done so in one part of the United States, *petitioners could and did apprehend danger* and were well within their rights in refusing to answer the questions before the grand jury regarding their views, activities, and associations, if any, in the Communist Party.

The trial court, following the statement by the special assistant attorney general, Mr. Goldschein, stated it is no crime to be a Communist, if that be true, and we believe it is, then what right does the government have to compel one to disclose his or her political views and associates regarding Communism? Under the First Amendment the political and religious convictions of individuals are sacred. In the sphere of religion and politics, insofar as it affects the thinking, advocacy and associations of individuals, the government may not intrude. On the other hand, if the government, through

the same Department of Justice, charges it is criminal to be a Communist, and has brought indictments and obtained convictions against Communists, *then the inevitable conclusion cannot be denied that these petitioners had a right to refuse to answer for fear of self-incrimination.*

II.

Petitioners under the First Amendment of the Constitution of the United States have a right to freedom of thought and advocacy and the Government cannot compel disclosure of political opinion and association.

It has been shown that the questions put to petitioners before the grand jury were directed to their political affiliation. *Pro tanto* the questions were also directed to their political belief. According to the presentments, the proceeding below was designed to compel petitioners to disclose their political beliefs, activities and associations, only to determine if an offense had been committed.[11] Actually, Communists were being prosecuted.[12] Compulsory disclosure of matters of the mind regarding political belief is beyond the power of government. Individuals under the First Amendment have an absolute right to whatever political beliefs and political associations they choose. Their rights in regard thereto are paramount to the authority of government.

The First Amendment was conceived and has been applied as a charter of government, purposed to vouchsafe to the people their sovereignty over the state. The American Revolution established the supremacy of the people and their right to select their form of government, to determine its policy,

11. See (R 86, 97)

12. See Judge Denam's supplement to Alexander vs. U.S. 181 Fed. 2d 480 at 486.

and if need be, to change the very form of government itself. Indispensable to the preservation of these rights is the freedom formulated in the First Amendment. The political system created by the Constitution can function only when the people are free to advocate all forms of political thought and discuss and associate with others of similar views. Only when people are relieved of all restraint in the intellectual process of political speculation can the basic law of the land receive its full meaning.

> "They (i.e. those who won our independence) believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . ." (brandeis J. concurring in *Whitney vs. California* 274 U.S. 357, 71 L. Ed. 1095).

This freedom to think and speak can only exist when the government is denied the right to inquire into the political beliefs, thoughts and associations of the people.

> "The constitutional fathers, fresh from a revolution, did not forge a political straightjacket for the generations to come. Instead, they wrote Article 5 and the First Amendment, guaranteeing freedom of thought, soon followed * * *"
>
> * * *
>
> "* * * Whatever attitude we may individually hold toward persons and organizations that believe in or advocate extensive changes in our existing order, it should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment." *(Schneiderman vs. United States*, 320 U.S. 118, 87 L. Ed. 1796).

The struggle out of which the American concept of government emerged pointed to the dangers of government coercion upon the minds and will of the people.

> "This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, *as do many opinions of this Court,* the importance of preventing the restriction of enjoyment of these liberties." *(Schneider vs. Irvington* 308 U.S. 147, 161, 84 L. Ed. 155, 164-5. See also *Stromberg vs. California* 283 U.S. 359, 369, 75 L. Ed. 1117, 1123; *De Jonge vs. Oregon* 299 U.S. 353, 365, 81, L. Ed. 278, 284.) (Italics ours)

We say that when petitioners were brought before the grand jury and questioned about their political beliefs, their activities and associations, then "a political straightjacket" was being placed around them. No other conclusion can be reached except that they were being restricted in the enjoyment of liberty of political thought when they were made answerable regarding such thoughts, beliefs and associations.

> "* * * Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. * * *"
>
> * * * *
>
> "If there is any fixed star in our constitutional constellation, it is that *no official, high or petty, can pre-*

scribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*Board of Education vs. Bernette*, 319 U.S. 624, 87 L. Ed. 1628). (Italics ours).

Under the American Constitutional system of government, the right of free speech and free thought is absolute. The government can never interfere with speech or advocacy as such. When words are used not to persuade but to incite to violence and crime, the state may interfere—not against the speech, but against the violence and crime. But even here the state may interfere only when the nature of the words and the circumstances of their use create an extremely imminent danger of the evil the state can prevent—not where the opportunity for discussion still remains. (Rutledge J. in *Musser vs. Utah*, 68 Sup. Ct. 397, 333 U.S. 95, 92 L. Ed. 355; *Thomas vs. Collins* 323 U.S. 516, 89 L. Ed. 430; *De Jonge vs. Oregon supra; Thornhill vs. Alabama* 310 U.S. 88, 84 L. Ed. 1093; *Bridges vs. California* 314 U.S. 252, 86 L. Ed. 192. See quotation from Thomas Jefferson in *Reynolds vs. United States* 98 U.S. 145, 25 L. Ed. 244).

When the trial court sought to compel the petitioners to answer regarding political thought, activity and association, it was treading on forbidden ground. For the reason that while more may be claimed for the scope of the First Amendment, at the very least it is correct to say that the individual is free to hold any political ideas he may deem best and to associate with others to advance those ideas. The minimal reach of this freedom is to deny the government power to compel a disclosure of his political beliefs and associations. In the case at bar we are not concerned with an individual's willingness to make such disclosures. *We are concerned only with the government's power to compel them.*

Assembly and association are but the methods by which freedom to think and speak are realized in the political sphere. Mere isolated opinion is ineffective. The essence of democracy, in our society, is the opportunity for any one or more, unrestrained by government, to become a majority. Compulsory disclosure of beliefs and association for the purpose of prosecution destroys the very right which the Constitution seeks to protect. The right to assemble and associate are secured only when the government may not interfere.

> "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association, therefore, appears to be almost as inalienable in its nature as is the right of personal liberty. No legislator can attack it without impairing the foundations of society." (de Tocqueville, Alexis, *Democracy in America* (N.Y. 1946), Vol. 1, page 196.

The right of political associations is as effectively abridged by the process of compelling the petitioners to disclose through grand jury interrogations their views as well as by criminal prosecution. We would be blind to the facts of our time if this grand jury investigation were viewed as an isolated phenomenon. New York, Los Angeles and Denver are not the only cities where grand juries were attempting to pry into the thoughts, ideas and associations of political minorities. The official government drive against Communists and their philosophy dates back to the old Dies Committee of more than a decade ago. Since then, except for the brief interlude when our government and the Socialist State made common cause against Nazism and Fascism, the campaign against Communism has achieved, in a rising crescendo of partisanship and political bigotry, the full panoply of a crusade. Federal

and state legislative committees have arrogated to themselves the power to summon citizens and their papers and force them to disclose their political convictions. Organizations of all kinds —political, fraternal, social and economic—as well as individuals—scientists, actors, artists, writers, men of distinction in their field—have been subjected to scrutiny and inquisition regarding political views. These committees have had the audacity to affix their seal of disapproval on a vast gamut of ideas current in the thinking of our citizens today. For the Courts to put their stamp of approval on this type of inquisition, for the Courts to approve inquiry into political ideas and associations, whether by grand juries or legislative committees, means the end of the Bill of Rights. It means we are slowly but surely following the course which will lead to a destruction of the liberties and rights of the people and the creation of a police state. It will mean that though we have won the war, we have lost the peace.

Already we see that whenever anyone advocates ideas which run contrary to the views entertained by the inquisitors, or whenever anyone associates with others for the purpose of advocating such ideas, he is subject to being labeled a Communist. One so labeled, whether he is in fact or not a member of the Communist Party, finds his social and economic existence threatened, and may well face the danger of criminal prosecution. That Communists are being prosecuted is an established fact.[13] Thus, for the government merely to say it is not criminal to be a Communist is of no consolation to petitioners and in no way justified the inquisition and proceedings below. The petitioners' right to be or not to be members of the Communist Party is a choice for them alone to make and they alone may disclose the fact or keep it locked

13. Communists have not only been prosecuted, but have been convicted in the Southern District of New York on indictments based solely on membership in the Communist Party. See also the government's announced purpose as indicated in supplement to Alexander vs. U.S. supra, page 36 hereof.

within the seclusion of their own bosom. We conceived it to be the law of this land that citizens have indefeasible rights of privacy attendant upon the matters of their minds, their beliefs and their affiliations.

The safeguard of the Constitution grew out of the struggles for political freedom against the very devices which are in this case being used once again to suppress that freedom.

III.

The Fourth and Fifth Amendments to the United States Constitution dealing with Searches and Seizures and the Privilege Against Self-Incrimination give the citizen a right to privacy and silence against any effort to compel disclosure of his political associations and beliefs.

The Bill of Rights conjoins the guarantee of the First Amendment with the safeguards against unreasonable searches and seizures and self-incrimination of the Fourth and Fifth Amendments to achieve protection against compulsory disclosure of private opinions and affiliations. Tempered in the fire of religious and political upheaval, and hammered out in the struggle of men to rid themselves of oppression, these protective shields were developed to meet intrusions on the individual's privacy of opinion and affiliation. The privilege against self-incrimination finds its genesis in the struggle against enforced conformity to the established religion and to the divine rights of the Stuart monarchs. Techniques developed in England for the searching out of heretics and political dissenters were adopted in colonial America by royal governers and later by post-Revolutionary War state governments for the suppression of tories. The history of this long

and bloody struggle was fresh in the minds of those who won our independence, and to prevent its recurrence the Bill of Rights was written.

In 16th Century England, the state religion through the ecclesiastical courts undertook a crusade against heresy in which compulsory disclosure of belief was the principal weapon. Following a secret inquisition, in which the surmises and gossip and malevolence of neighbors and townsmen had been gathered, the accused was brought to trial, placed under oath and interrogated concerning his religious views. (See Henry Charles Lea, *A History of the Inquisition of the Middle Ages*, I, p. 407).

This procedure received a telling blow when Sir Edward Coke, Chief Justice of Common Pleas, granted a writ of prohibition against the High Court of Ecclesiastical Cause in the *Edward Case*, 13 Rep. 9. Coke's ruling was a recognition that men may not be examined or adjudged upon their opinions and beliefs:

> "—in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words and not of the intention or thoughts of his heart; and if any man should be examined upon his oath of opinion he holdeth concerning any point of religion, he is *not* bound to answer the same." (Italics ours)

Compulsory disclosure persisted in England and became a weapon of the Court of the Star Chamber, designed to suppress political dissent. Individuals were summoned on the basis of rumor and gossip, questioned as to their beliefs concerning absolute monarchy, and adjudged upon that which they held in their minds. This method foundered in the case of one John Liburn, an opponent of the Stuarts who refused before the Star Chamber to answer questions *"concerning other men to ensnare me and to get further matter against me"* (see

3 How St. Trials 1315, *et seq.*) Although Lilburn was whipped for his resistance, his case led to the abolition some two years later of the Court of the Star Chamber and to the creation of a statutory prohibition that compulsory disclosure no longer be required in penal matters. So deeply did the revulsion of that entire procedure run that a few years later Lilburn's sentence was vacated and he was granted handsome reparation for the punishment he had suffered.

The struggle against such compulsory disclosure was one of the deeply imbedded factors which led to the early emigration to America. Not only was it used to exact comformity, but it was also used to harrass dissenters who had determined to leave the country. (see R. Carter Pittman, 21 Va. Law Rev. 763, *et seq.*) In colonial America, the same device was used to exact conformity from those who dissented from the prevailing religious views in Massachusetts. The story of the trial of Ann Hutchinson, who was banished for unorthodoxy from the Massachusetts colony after conviction upon compelled admissions under oath, has been told by Mr. Justice Black. *Adamson v. California*, 332 U.S. 46, 99 L. Ed. 1903.

As it was there pointed out, such experiences as Mrs. Hutchinson's led to the public demand for the Bill of Rights in order to erect a barrier against laws "That encroached on the domain of belief," and "strip courts and all public officers of a power to compel people to testify against themselves."

Later, following the Revolutionary War, tories in some states were required to give oaths respecting their past allegiance to the revolutionary cause as a condition of voting or holding property. Such a requirement in Pennsylvania was voided on the basis of language in the state constitution similar to that of the Fifth Amendment prohibiting self-incrimination. *Respublica v. Gill*, 3 Yeates 429, discussed at 161 U.S. 633, 40 L. Ed. 833.

Alexander Hamilton led the battle against similar legislation in New York and his writings contributed to the decision of this Court in *Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356. These evils were designedly prohibited by the Bill of Rights which was established to protect the citizen against the possible tyrannies of the new government should it find itself indulging in the practice of English and continental despotism.

This tribunal has recognized these origins of the Fourth and Fifth Amendments. The principles laid down by Lord Camden in *Entick v. Carrington*, 19 How St. Trials 1029, who denounced the general search warrant, were taken over by the Court in its construction of the Fourth Amendment. Here the search warrant was denounced in these words:

> ". . . It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense."—*Boyd v. U.S.* 116 U.S. 616, 29 L. Ed. 746.

It is now judicially recognized that because of their very historical background here traced, these two amendments conjoin to protect individuals from inquisitorial investigation in matters of the mind and of their private papers and effects. See *Brown v. Walker*, 161 U.S. 591, 40 L. Ed. 819.

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in *Boyd v. United States*, 116 U.S. 616, in *Weeks v. United States* 232 U.S. 383, and in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385) have declared the importance to *political liberty* and to the welfare of our

country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is:

That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantee to the other fundamental rights of the individual citizen;—the right to trial by jury, to the writ of habeas corpus, and to due process of law. *It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts,* or by well-intentioned but mistaken over-zealous executive officers." —*Gouled v. United States* (1920) 255 U.S. 298, 303 65 L. Ed. 647, 650, Clarke, J. (Italics ours.)

"No one can read these two great opinions *(Entick vs. Carrington,* 19 How St. Tr. 1030, 1074, and *Boyd v. United States, supra),* and the opinion of the Pacific R. Commission case, without perceiving how closely allied in principle are the three protective rights of the individual —*that against compulsory self-accusation,* that against unlawful searches and seizures, and *that against unlawful inquisitorial investigations.* They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. *Even the shortest step in the direction of curtailing one of these rights must be halted in limine, lest it serve as a precedent for further advances in the same direction for* wrongful invasions of the others."

Sutherland, J. *Jones vs. Securities and Exch. Com.* (1935), 298 U.S. 1, 28, 80 L. Ed. 1015, 1027. (Italics ours.)

See also *U.S. v. Bell*, 81 Fed. 830.

In the middle of the 19th Century, congressional investigations were made of alleged election irregularities in New Jersey and elsewhere. In these cases voters were summoned and asked how they voted. Their refusal to testify was respected by the Legislative Committee and secondary evidence was taken on the question. The right of the citizen to keep secret his political conviction and vote was accepted as a matter of course.

Congressional Globe, 29th Cong. 1st sess. 1845-46 app. p. 455.

The Fourth and Fifth Amendments when viewed historically, therefore, have as their central theme the protection of individuals from the very type of inquisition in this case. They protect not simply the suspected Narcotic Law violator or the sharp merchant who may have violated the Interstate Commerce Act (see *U.S. vs. Weisman*, 111 F 2d 260, and *Counselman v. Hitchcock*, 142 U.S. 547, 35 L. Ed. 1110) against the possibility of criminal prosecution and punishment; they were designed primarily to protect the persons and organizations whose views run counter to either official orthodoxy or prevailing opinion. They were developed so that the rights outlined in the First Amendment could have protection in practical life from the interests of those who would not tolerate opposition. The First Amendment defines the right of political belief and affiliation. The Fourth and Fifth Amendments are impassible barriers to the use of governmental power to limit or destroy the exercise of such rights.

IV.

The Court of Appeals erred in disregarding Petitioners' showing that the trial court denied to Petitioners due process of law.

The opinion of the Court of Appeals makes no mention whatever regarding the contention of denial of due process and the showing made in support thereof.

The only comment by the Court of Appeals is that:

> "The proceedings before the trial court were in some manner irregular and leave much to be desired. . . ." (R 298)

The government served no charges against the petitioners in the cases now before this Court. The fact is that Jane Rogers and Irving Blau were convicted of contempt on September 23, 1948 (R7, 27). Yet the Court of Appeals charges said petitioners with knowledge of the content of the presentments in the Bary, Kleinbord and Tracy Roy Rogers cases (R 298) (2R 41, folio 116) when in point of time petitioners Jane Rogers and Irving Blau could not possibly have been aware of the object of the grand jury investigation because that was not disclosed until October 6, 1948 when the presentments were filed (R 89, 100). We think the Court of Appeals expected something beyond the realm of human possibility when it expected said petitioners to have knowledge of "the posture of the case before the trial court on the presentments in contempt", (R 304) which were not filed until some two weeks after their conviction. This certainly can hardly be regarded as a mere irregularity. What it in fact amounts to, is a conviction for contempt on an alleged charge *in another case before that case is even filed.*

The petitioners had a right to act on what was apparent

to them at the time, and the Court of Appeals indicated it appeared that the purpose of Mr. Goldschein, Special Representative of the Government, was something other "than to unearth violation of 18 U.S.C., Paragraph 80, as stated in the presentments" (R 299). As a matter of fact, at the time petitioners Jane Rogers and Irving Blau were in court, the court itself was not advised what the grand jury was investigating (R 73). Thus, at the time of the hearings in the cases of Jane Rogers and Irving Blau neither the Court nor the petitioners were aware of the actual nature of the investigation. The Court of Appeals was clearly in error to charge petitioners with knowledge of "the posture of the case before the trial court on the presentments in contempt" when the trial court itself was unaware of the posture of the case. Such a proceeding where neither the judge nor the litigants are aware of the matter under investigation must by its very nature be a nullity. It certainly isn't due process.

Since in the cases of these petitioners no charges were filed, we contend that the contempt, even if it is direct but out of the actual presence of the judge and not within his hearing or vision, due process of law requires that the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.

Camarota vs. United States, 111 F 2d 243.

Cooke vs. United States, 267 U.S. 517.

Rule 42 (b) Federal Rules of Criminal Procedure.

The judgments indicate petitioners were sentenced under 18 U.S.C.A., Sec. 401-2[14] (R 7, 27). This proceeding is void if under Sec. 401, as said section provides the Court shall have

14. 18 U.S.C.A. Sec. 401-2 apparently refers to U.S. Code Congressional Service 80th Congress, second session, 1948 and appears in that section of Volume 1 under Title 18, United States Code, Crimes and Criminal Procedure at Page A 350.

power to punish such contempt of its authority only as to

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

Because these were summary proceedings, and in summary proceedings the judge must certify "that he saw or heard the conduct constituting the contempt and that it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the judge and entered of record" (Rule 42 (a) Federal Rules of Criminal Procedure). This was not done in this case.

If, on the other hand, the adjudication and sentence is under 18 U.S.C.A. 402, the proceedings are likewise void, (first) because that section pertains only to indirect contempts which "constitute also a criminal offense under any statute of the United States" and (secondly) because petitioners were not given hearings as required by law. The adjudication and sentence of petitioners amounted to a finding and sentence for an offense for which they were neither charged nor tried. The trial court's action plainly denied them the "rudimentary requirements of fair play." *Norgan vs. United States,* 304 U.S. 1. See also Rule 42 (b) Federal Rules of Criminal Procedure.

Petitioner Patricia Blau was ordered to appear before the grand jury on the 4th day of January, 1949. She did so appear and was ordered to return that same afternoon. (2R 4, 5, 6, folio 75) whereupon the Court, over the objection of counsel, immediately proceeded to hear the matter and when counsel

objected to the haste in having the hearing on such short notice, the Court remarked:

> The Court: "Your client can tell you what happened and what she is here for. You know as well as I do and she knows. This is just a proceeding we have been through here a half-dozen times." (2R 6, folio 76)

Finally, after further protestation of counsel, the Court allowed counsel the requested five minutes with the client (2R7 folio 78). It is quite apparent from the colloquy between Court and counsel that a request of more than a few minutes would have been denied.

In *Cooke vs. United States, supra:*

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires *that accused should be advised of the charges and have reasonable opportunity to meet them by way of defense or explanation.* We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony * * *." (Italic ours)

And to the same effect is *Camarota vs. U.S., supra:*

> ". . . It is true that where as here, the contempt was not committed in the actual presence and hearing of the district judge due process requires that the accused should be advised of the charges *and have a reasonable opportunity to meet them by way of defense or explanation.* . . . ." Italics ours)

See also *People vs. McKinley*, 11 N.E. 2d 933, 367 Ill. 504; *Ex Parte Daws* 239 Pac. 689, 31 Okla. Cr. 397; *Cannon vs. State*, 55 Pac. 2d 135, 58 Okla. Cr. 451; *Ex Parte Reil*, 62 Pac. 2d 1035, 60 Okla. Cr. 217. These cases are also applicable to the following situation:

In the case of Irving Blau (R 51 to 53):

Mr. Goldschein: I have the original copy—

The Court: Read the transcript.

Mr. Goldschein: The Court may have it to refer to.

The Court: What page?

Mr. Goldschein: Beginning, may it please your Honor, on page 35.

Mr. Menin: If the Court please, it seems to me that the witness is put at a disadvantage. I don't have a copy and they refused to let me see the testimony of what the complaint is about.

The Court: Listen to this testimony and if it isn't correct you can take it up. You don't need a copy.

Mr. Menin: Before I argue this matter I should have a copy of it.

The Court: You are not entitled to counsel. Please proceed.

Mr. Menin: Let the record show the Court indicates that the witness is not entitled to counsel at this stage of the proceeding.

The Court: What?

Mr. Menin: As I understand you—

The Court: I said I didn't think he was, but I said I would allow you to appear for them if you want to.

Mr. Menin: I am appearing for him, and as his counsel I demand the right to see what testimony is being complained of so that I may intelligently be able to defend him in this proceeding this morning.

The Court: You can listen to the record as it is read. That's the reason I'm having it read, so you can tell what it's about.

Mr. Blau: I'd like to have a copy of this transcript so that I may follow it.

The Court: You're not entitled to it. Just be seated. I'll let it be read and you listen to it and if you want to correct anything, let it be read again.

Mr. Menin: Let the record show the Court has ruled we are not entitled to a copy of the proceeding upon which these proceedings are being heard at this time.

The Court: The Court holds that it isn't necessary. The record is to be read and you can listen and make any corrections in it or objections as you may be advised. Now please proceed.

Mr. Goldschein: May it please the Court, I refuse to let the defendant or his counsel see it.

At this point it will be noted that not only is a summary proceeding being held, but appellant and his counsel are not even permitted to have a transcript, so as to be fully advised of the matters complained about. We submit that all the rules of fair play and due process were utterly and brazenly denied petitioner. As a matter of fact, the tone of the Court and Mr. Goldschein seems to be that of ridiculing and humiliating counsel and petitioner.

Petitioner Blau requested and was granted five minutes to consult with his counsel. Upon returning into court, the following occurred:

R 75:

(Mr. Blau enters the Court room.)

The Court: Will you step up to the bar of the court.

Mr. Menin: May I for the purpose of the record—

The Court: No. Just a minute until the Court finishes. What is your name?

Mr. Blau: Irving S. Blau.

The Court: Where were you born?

Mr. Blau: *Younkers,* New York.

The Court: The Court having found you guilty of contempt and in violation of the laws of the United States, it is the sentence and judgment of the Court that you serve a term of six months in jail and be committed to the custody of the attorney general. What is the next case?

Petitioner Irving Blau was given five minutes to consult with his counsel, upon return to the courtroom his counsel started to make a statement to the Court. The Court refused to permit counsel to speak and summarily sentenced petitioner to jail for six months and called for the next case. Of what good was this consultation? It may well have been, had the Court accorded petitioner due process and permitted counsel to speak in his behalf, that petitioner would not have been held in contempt.

At R 28 there is a certificate of the trial judge in which the following appears (R 29) in an exhibit referred to as Exhibit A:

> "That said Irving Blau *was afforded an opportunity to consult with Mr. Samuel D. Menin, his counsel, and after stating that he did not desire to change his answers, the Court found him guilty of contempt. . . .*"

The fact is that the record simply does not support any such thing. The Court permitted petitioner five minutes

with his counsel and then refused to permit petitioner or his counsel to say anything to the Court. Exhibit "A" refers to the proceedings above referred to (R 75).

And in R 70:

The Court: Let me see the case, please.

Mr. Menin: I want to point out to your Honor that in this case the Court refers to the immunity statute and says—

The Court: Let me see and I'll decide for myself.

Mr. Menin: —and says that immunity would have obtained regardless of the statute.

The Court: You didn't mention immunity statute in your argument.

Mr. Menin: Well, I was trying to read the whole thing when your Honor stopped me. I was going to get to the whole thing, but I would point out to the Court—

The Court: Mr. Menin, please take your seat or the Court will have *to take sterner measures with you.* (Italics ours).

R 79:

The Court: I can't agree with this opinion. Where is the party?

Mr. Menin: Well, may I have it? Now just—

The Court: Just a minute.

Mr. Menin: This is something else. Just to show that I have not misrepresented to the Court, I would like your Honor to read the indictment.

The Court: I'm not concerned with that question. It doesn't throw any light on this question.

Mr. Menin: No, but it does throw light on the statements—

The Court: Will you please be seated? If you don't obey the Court *I will take you into custody*. (Italics ours).

We submit that it is almost beyond the realm of possibility for counsel to exert on behalf of his client that warm zeal and the utmost of his endeavors which is required of him in the defense of his client when he is contantly confronted with the threat of being placed in "durance vile."

The right to counsel is as effectively hampered by threats to remove counsel from the Court as a denial of counsel, since it tends to immobilize the defense. It places upon counsel the concern for his personal safety, thus hampering him in his obligation to freely exert his utmost learning and ability on behalf of his client.

The right to counsel is of such ancient origin as not to be open to question. This Court has many times characterized the denial of counsel as a denial of due process of law.

V.

The Court of Appeals erred in its ruling regarding the matter of privileged communications.

"PRESUMPTION OF CONFIDENTIAL CHARACTER OF COMMUNICATIONS. Communications between husband and wife *are presumed to be confidential, and one seeking to put them in evidence has the burden of overcoming the presumption.* The fact that acts or words similar to those done or uttered in private occur or are used in the presence of third persons raises no presumption that the presumably confidential character

thereof is released." (Emphasis ours) (American Jurisprudence, Vol. 58, Page 231, Sec. 399).

Petitioner Irving Blau testified that his knowledge of the whereabouts of his wife "at present is based on a privileged communication." (R 55)

The Court of Appeals has, in its opinion, stated, "In order, however, to make the communication privileged, it must be of a private and confidential nature, and must have come to one by virtue of the marital relation," and that, "there is nothing in the record indicating that this knowledge ever came to him *as a result of a communication*, confidential or otherwise."[15] The cases in footnote 2 of the opinion of the Court of Appeals and the record do not support that conclusion. Those cases support the rule that *communications between husband and wife are by implication assumed to be confidential.* See *Fraser vs. U.S. infra* and *Wolfle vs. U.S. infra.* The record clearly indicates that petitioner's knowledge of his wife's whereabouts was based on a privileged communication (R 31, 53, 55).

At the time these proceedings were had, the public press with glaring headlines and articles were denouncing the petitioners and subjecting them to all sorts of abuse and ridicule. It was a matter of common knowledge that Mrs. Blau was being sought in order to be subjected to interrogation before the grand jury by Mr. H. M. Goldschein, special prosecutor for the government.

She communicated with her husband secretly and confidentially regarding her whereabouts, so that he, as her husband, would be reassured as to her safety. *She communicated with her husband solely and only because of the existence of the marital relation between them.* She would have no reason to, and did not disclose her whereabouts to others. This is estab-

15. Blau vs. United States 179 Fed. 2d 559 at 564. Also see R 305.

lished by the fact that others who knew her were asked about her whereabouts and they did not know (R 110, 111, 120, 123, 159).

From the facts and circumstances surrounding the refusal of petitioner Blau to disclose his wife's whereabouts, no other conclusion can be arrived at except that the communication was made in confidence and in pursuance of the sacredness of the relationship existing between husband and wife. But we do not rely on this conclusion alone. *There is a legal presumption that the communication is confidential.* (American Juris. Vol. 58, Page-231 supra)

Wigmore stated the law thus:

> "It would seem proper to hold that all marital communications are *by implication confidential*, and that the contrary intention must be made to appear by the circumstances of any given instance. Looking at the habits of married persons and the infrequency of express injunctions of secrecy, *this implication of confidence seems more consonant with the facts of life.* Such is practically the general judicial attitude, in spite of apparent different phrasing. (Wigmore, Vol. 5 2d Ed. Sec. 2336) (Emphasis ours)

In the case of *Fraser vs. United States*, 145 Fed. 2d 139 cited in the notes to support the decision of the Court of Appeals we find at page 143 the Court saying:

> ". . . *All marital communications are by implication confidential, and a contrary intention must be made to appear* by the circumstances of any given instance. Such is the general judicial attitude. . . ." (Italics ours)

Can it be said that Mrs. Blau, who was being sought in order that she might be subjected to interrogation by Mr. Goldschein before the grand jury, wanted the world to know

her whereabouts. Was there any circumstance existing which would overcome the presumption or the implication of the confidential nature of the communication. *If there was, the government failed to show it, and the presumption must prevail, as "the one seeking to put them (the communications) in evidence has the burden of overcoming the presumption."* (American Juris. supra)

Wolfle vs. United States 54 Sup. Ct. 279, 291 U.S. 7, also cited by the Court of Appeals in the note to the opinion, does not support its finding. This tribunal there said:

> "Communications between the spouses, privately made, are generally *assumed to have been intended to be confidential and hence they are privileged.* . . ." (Italics ours)

Regarding this, we call attention to some of the language used by this Court. "The preservation of the marriage relationship" is so essential "as to outweigh the disadvantages to the administration of justice."

In the case of *In re Ford's Estate*, 261 Pac. 15, (Utah), another case cited by the Court of Appeals in note 2, the only testimony one of the spouses was permitted to give, is where violence was used, and the Court excluded all other testimony. This is clearly indicated by the comment:

> ". . . The other incident testified to, however, seems to us to stand on different ground. There was no violence, actual or threatened, no menacing conduct—and no obscene language. . . ."

The Court of Appeals entirely overlooked the provision of the Colorado law which is here applicable. *(First Trust Co. vs. Kansas City Life Ins. Co.*, 79 Fed. 2d 48)

The Colorado law 35 C.S.A. Chap. 177, Sec. 9 reads as follows:

"9. *Who may not testify without consent*—There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

First—A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor shall either during the marriage or afterward be without the consent of the other, *examined as to any communications made by one to the other during the marriage;* but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. . . ." (Italics ours)

It is to the interest of the state and nation that the relationship between husband and wife be a matter of mutual confidence. This is a rule of the common law, adopted for the protection of the institution of marriage. (see 58 American Jurisprudence, page 220) Later the various states of the union reaffirmed that principle by enacting into their laws provisions similar to the Colorado Statute. It was never the intent of the law, whether common or statutory, that a husband should be subjected to inquisition under governmental authority and compelled to betray his wife. To sustain the lower court on such a proposition would be a perversion of governmental authority. The government of the United States should not become a party to destroying the mutual confidence which results from marriage.

This petitioner would hardly be entitled to the designation of man, had he cringingly disclosed to Mr. Goldschein and the grand jury the confidential communication from his wife in order to save himself from being placed in "durance vile."

The law, we trust, as it will be pronounced by this Court, will protect him. For surely the law will not lend itself to make cringing cowards of men by forcing them to betray the confidences placed in them by their wives.

Conclusion

The issues now before this Court are of grave portent. At stake are serious constitutional questions which affect not only petitioners, but which will affect all the people. We believe that in the ever present struggle between the people and their government the Fifth Amendment was adopted as a warning to government not to encroach upon an area reserved to the people. It was never intended that the power of the government to prevent and punish crime be so misused as to compel a person to testify against himself, to brand himself, to confess to heresy. The Fifth Amendment was also intended to guarantee to those who are brought before the courts the right to due process of law, the right to a fair hearing, the right to know what the nature of the inquiry is, the right for reasonable time to prepare a defense and the right to counsel. These rights were not accorded these petitioners when in the face of the announced purpose of the department of justice to prosecute Communists, petitioners were subjected to inquisition as to whether or not they were members of the Communist Party, what their activities were and who their associates are. They were not accorded due process when they were denied the right to a hearing on notice. They were not accorded due process when their counsel was threatened with being taken into custody. In short, they were not given a hearing in accordance with the law of the land.

If the government can pry into the minds of the people and uncover their beliefs and associations regarding politics, then

it is but a step to inquire regarding religion. When that occurs, we will then find in our midst the very police state which we fought against, and against which American blood was spilled. We call upon this Court to defend and protect the traditional rights and liberties of the people. While the government will contend that the grand jury sought merely information, the Constitution reminds us that this information, was beyond its reach. In the midst of the current official attack upon "Communism" to which the press bears daily witness, the government has presumed to bend the procedure of the Courts to give a necessary note of legality to its illegitimate purpose.

The American Bar Association Journal in an editorial discussing "The Star Chamber aspects displayed by certain congressional committee investigators" made this observation:

> "* * * It is even more disturbing to see contempt charges predicated upon a refusal by a witness, under subpoena, to answer a question on the ground that it may incriminate him. This raises the shadow of an inquisition. Americans have never approved of Torquemada's tactics."[16]

That which entitles our courts to be described as "havens of refuge for those who might otherwise suffer because they are * * * non-conforming victims of prejudice or public excitement" (*Chambers vs. Florida*, 309 U.S. 277, 84 L. Ed. 716) requires that this Court reject and repudiate such attempted perversion of judicial power.

That because these are times of great public excitement requires that this Court, give more careful judicial consideration

16. American Bar Association Journal Editorial, "Page Tom Paine", Vol. 36 No. 6 June, 1950, page 474.

and exercise greater vigilance against attrition of the foundations of political liberty.

The judgments in each of the proceedings herein should be reversed.

Respectfuly submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 20

JANE ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 21

IRVING BLAU, PETITIONER

v.

UNITED STATES OF AMERICA

No. 22

PATRICIA BLAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 20

JANE ROGERS, PETITIONER

v.

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No. 21

IRVING BLAU, PETITIONER

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PATRICIA BLAU, PETITIONER

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UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals in Nos. 20 and 21 (and other cases not now before this Court, R. 297–306) is reported at 179 F. 2d 559

and its opinion in No. 22 (and one other case not now before this Court, 2R. 40–42)[1] is reported at 180 F. 2d 103.

JURISDICTION

The judgments of the Court of Appeals in Nos. 20 and 21 were entered on January 5, 1950 (R. 306–307), and a petition for rehearing (R. 308–321) was denied on January 28, 1950 (R. 322). The judgment of the Court of Appeals in No. 22 was entered on January 31, 1950 (2R. 43). The petition for writs of certiorari was filed on February 27, 1950, and was granted as to these three petitioners on May 15, 1950 (R. 323; 2R. 43; 339 U. S. 956). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether by testifying on details showing her official position in the Communist Party a witness waived her privilege against self-incrimination with respect to further questions dealing with membership records of the Communist Party.

2. Whether answers to questions tending to show membership in, or affiliation with, the Communist Party are incriminating and therefore privileged under the Fifth Amendment.

[1] The records in these three cases are contained in two volumes. Like petitioners, we employ the designation "R" for the volume bearing cover designation of proceedings in Nos. 20 and 21 and "2R" for the volume bearing cover designation of proceedings in No. 22.

3. Whether answers to questions which would tend to show membership in, or affiliation with, the Communist Party may be refused under the First Amendment.

4. Whether a husband may refuse to testify as to his wife's whereabouts on the single assertion that his knowledge is based on a "privileged communication", in the absence of a showing that the communication was made in private and was intended to be confidential.

5. Whether the petitioners were denied due process by the procedures followed by the district court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

The Fifth Amendment provides that:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Sections 2, 3, and 5 of the Act of June 28, 1940, c. 439, 54 Stat. 670, 671, commonly known as the Smith Act, provide in pertinent part as follows:[2]

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[2] These sections are now consolidated, with merely phraseological changes, as 18 U. S. C. 2385, except that the conspiracy clause of Section 3 is "omitted [from § 2385] as covered by the general conspiracy provision [§ 371]." See Reviser's note.

Sec. 2 [18 U. S. C. (1946 ed.) 10]. (a) It shall be unlawful for any person—

* * * * *

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

Sec. 3 [18 U. S. C. (1946 ed.) 11]. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

* * * * *

Sec. 5 [18 U. S. C. (1946 ed.) 13]. (a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both.

STATEMENT

Petitioners were found guilty of criminal contempt of court in the United States District Court for the District of Colorado. In each case, the petitioner had been under subpoena before a grand jury and had first refused to answer certain questions before that body. The refusals were reported to the court and petitioners, in disobedience of the court's directions that they must answer the questions, again refused in the presence of the court. They were sentenced as follows: Jane Rogers, four months' imprisonment (R. 7–8, 78); Irving Blau, six months' imprisonment (R. 27, 75); Patricia Blau, imprisonment for one year (2 R. 36–37). Upon appeal to the Court of Appeals for the Tenth Circuit, the convictions were affirmed (R. 306–307; 2 R. 43).[3]

Petitioners are three of a group of witnesses called before a grand jury in Denver, Colorado, in September, 1948. In the presentments made to the court in the cases of the witnesses Bary (R. 86), Kleinbord (R. 97–98) and Tracy Roy

[3] The Court of Appeals also affirmed the commitments for civil contempt of the witnesses Arthur Bary, Paul Meir Kleinbord (R. 96–97, 103–104, 307–308), and Tracy Roy Rogers (2 R. 40–42), but reversed the conviction of Nancy Wertheimer for criminal contempt (R. 18–19, 301–303, 305–306). Bary, Kleinbord, and Tracy Roy Rogers also sought certiorari, but we suggested that their cases had become moot by reason of the expiration of the term of the grand jury. See our memorandum in Nos. 635–640, O. T. 1949. Certiorari was denied as to them. 339 U. S. 958.

Rogers (Nos. 639, 640, O. T. 1949, R. 4[4]), the grand jury stated that it had undertaken—

> * * * an inquiry concerning various employees of the United States Government who had allegedly made false statements in connection with their loyalty investigation in violation of Section 80, Title 18 U. S. C. and other criminal laws of the United States.
>
> In pursuing such inquiry it became necessary for said Grand Jury to inquire into and ascertain the following: The names of the officers of the Communist Party of Colorado; the identity of persons in charge of the books and records of the Communist Party of Colorado, showing or pertaining to the membership of the Communist Party of Colorado.

The witnesses called before the grand jury included, according to their own direct admissions before that body, the chairman of the Communist Party of Colorado, Arthur Bary (R. 108), the section organizer and secretary-treasurer of the Denver section of the party, Paul Meir Kleinbord (R. 129, 132),[5] a former treasurer of the party in Denver, petitioner Jane Rogers (R. 39), and

[4] This transcript included the proceedings in the cases of Tracy Roy Rogers and Patricia Blau. When this record was reprinted following the grant of certiorari as to Patricia Blau and the denial as to Tracy Roy Rogers (see footnote 3, p. 5, *supra*), the proceedings in Rogers' case were omitted.

[5] Kleinbord also testified that he formerly was membership director for Denver.

a former secretary of the state party organization, Tracy Roy Rogers (Nos. 639, 640, O. T. 1949, R. 9). Petitioner Patricia Blau was identified by Bary in his testimony as the secretary of the Communist Party of Colorado (R. 108, 121). None of the witnesses, however, would divulge the location of the membership records or state in whose custody they could be found. Two refused to answer practically all the questions put to them (Wertheimer, R. 40–41, 50; Irving Blau, see pp. 12–15, *infra*) and the others, while they admitted, directly or indirectly, their connections with the party, nevertheless refused to disclose information as to the records (Jane Rogers, see pp. 7–12, *infra;* Bary, R. 107–127, 170–183; Kleinbord, R. 128–146, 184–196; Tracy Roy Rogers, R. 165–168; Nos. 639, 640, O. T. 1949, R. 8–18, 33–49; Patricia Blau, 2 R. 13–16, 24–27; see also discussion *infra,* pp. 16–19).[6]

The proceedings in the District Court as to each petitioner may be summarized as follows:

Jane Rogers.—She testified before the grand jury that she had been treasurer of the Communist Party of Denver and that up to January 1948 she had had possession of party records of dues paid by the members, as well as other records, but that she no longer had possession of

[6] At some points in their testimony Bary, Kleinbord, and Tracy Roy Rogers also professed ignorance as to the whereabouts of the records (Bary, R. 126–127; Kleinbord, R. 138–139; Tracy Roy Rogers, R. 167).

such records (R. 39).[7] She also testified to other matters "pertinent to the issue." She refused, however, to state to whom she had turned over the records (R. 38–39). She was brought before the court on September 21, 1948, and the following occurred (R. 39):

> The COURT. Now, what is the question?
>
> Mr. GOLDSCHEIN [Special Assistant to the Attorney General]. Who has the books and records of the Communist Party of Denver now? Who did Mrs. Rogers give those books up to as she says she gave them up in January of this year?
>
> The COURT. Do you care to answer that question, madam?
>
> Mrs. ROGERS. I do not.
>
> The COURT. What?
>
> Mrs. ROGERS. I do not, and that's what I told them.
>
> The COURT. Why won't you answer?
>
> Mrs. ROGERS. I don't feel that I should subject a person or persons to the same thing that I'm going through.

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[7] Government counsel, in paraphrasing for the District Court Mrs. Rogers' testimony before the grand jury, stated that she had been treasurer for "several years" (R. 38). The record does not contain the transcript of Mrs. Rogers' testimony before the grand jury. She stated to the court that her term as treasurer had actually been "about a year" (R. 39). It is not clear whether the witness meant that the paraphrasing of her testimony before the grand jury as to the length of her service as treasurer was incorrect or that she had testified that her term was "several years" but desired to correct her testimony.

> The COURT. It is the order or finding of the Court that you should answer those questions. Now, will you do that?
>
> Mrs. ROGERS. No.
>
> The COURT. Then the Court will commit you to the custody of the marshal to be held until further order. Court stands adjourned.

The court ordered that she be detained overnight and that a hearing be held the following morning "on your reasons for refusal to answer questions" (R. 39–40).

The next day Mrs. Rogers appeared with counsel, Samuel D. Menin, and the following occurred:

> Mr. MENIN. * * * In regard to the witness Rogers, I've read the transcript of what has transpired in court here yesterday; and I believe that upon my advice she will answer questions which were propounded to her [R. 43].
>
> * * * * *
>
> Mr. MENIN. As to the witness Jane Rogers, I think she will purge herself of her contempt by answering the questions.
>
> The COURT. In the case of the witness Rogers, then, the order of the Court is that she return to the Grand Jury room and if she purges herself of contempt, then upon bringing the matter back to the Court, she will be discharged. In the meantime, she will remain in custody. [R. 49.]

Mrs. Rogers again refused to answer and was brought before the court on the third day, Sep-

tember 23, 1948, together with the witnesses Irving Blau and Nancy Wertheimer, who had also refused to answer questions before the grand jury (R. 50–51, 76–77, 78). On their behalf, Mr. Menin resumed his argument of the day before on behalf of Wertheimer that in view of the provisions of the Smith Act and the then pending indictments of the national leaders of the Communist Party in New York (*United States* v. *Dennis et al.*, 183 F. 2d 201 (C. A. 2), certiorari granted October 23, 1950, No. 336), the witnesses were justified in refusing to answer questions concerning their membership and activities in the party for fear of self-incrimination (R. 43–49, 61–69). His position, as stated on September 22, was that an admission of membership in the party "would necessarily indicate that the person who had answered those questions believes in the doctrines of Marx and Lenin. Therefore, it is a conclusion of that witness Wertheimer]—and I say, therefore, not without legal justification—that if she were to answer that question she would subject herself to a possible indictment for a belief in doctrines which the Government now considers amounts to a doctrine to overthrow the Government, and thus she would be incriminating herself by being compelled to answer that question" (R. 44–45; see also R. 46–47, 49).

After disposing of the case of Irving Blau (see p. 12–15, *infra*), the court resumed consideration of Mrs. Rogers' case, as follows (R. 77–78):

Mr. GOLDSCHEIN. Mrs. Rogers refuses to answer the questions propounded to her in the grand jury room. She was brought back on yesterday, but says that she will answer one question but will not answer any others, and was advised that it would be necessary for her to answer all questions propounded except those which would incriminate her for the violation of a federal offense, and she says she won't answer any.

The COURT. Is that your position, madam?

Mr. MENIN. I think there has been a misunderstanding.

The COURT. Just a minute. Will you please be seated, Mr. Menin? Please be seated.

Mr. MENIN. Well, I represent this lady.

The COURT. Just a moment. Please be seated.

Mr. MENIN. Very well.

The COURT. I'll hear you in due course. Madam, do you still persist in not answering these questions?

Mrs. ROGERS. Well, on the basis of Mr. Menin's statements this morning——

The COURT. Will you please answer the question yes or no?

Mrs. ROGERS. Well, I think that's rather undemocratic. I'm a very honest person.

Would you mind letting me consider——

The COURT. Make any statement you wish.

Mrs. ROGERS. Well, as I said before, I'm a very honest person and I'm not acquainted with the tricks of legal procedure, but I understand from the reading of these cases this morning that I am—and I do have a right to refuse to answer these questions, on the basis that they would tend to incriminate me, and you read it yourself, that I have a right to decide that.

The COURT. You have not the right to say.

Mrs. ROGERS. According to what you read, I do. I stand on that.

The COURT. All right. If you will make no changes, it is the judgment and sentence of the court you be confined to the custody of the Attorney General for four months. Call the next case.[8]

Irving Blau.—He was brought before the court on September 23 (R. 50) because of his refusal to answer a number of questions before the grand

[8] It is clear from this statement of the proceedings that petitioner is wrong in her assertions (Br. 9; see also p. 12) that "the Court did not bother to determine what questions Jane Rogers now refused to answer and the government made no showing as to the questions she refused to answer," and that the court "assumed" that the witness would make no changes in her testimony. When the court invited Mrs. Rogers to make any statement she wished (R. 77), there was only argument and refusal by her and not the slightest trace of an offer to answer, at the least, the question as to the person to whom she turned over the records.

jury. He had refused to answer, on the ground that his answers might tend to incriminate him, questions whether he held any office or official connection in the Communist Party, whether he ever collected dues from members of the party, and whether he ever assisted in calling a meeting of the party in Denver. He also refused to answer whether his wife held any position in the party in Denver on the ground that his knowledge in that regard "was based on a privileged communication" (R. 53–54, 57). In addition, he refused to answer questions as to the whereabouts of his wife, as follows (R. 55):

> Mr. GOLDSCHEIN. Now, Mr. Blau, where is Mrs. Blau now?—A. My knowledge of her whereabouts at present is based on a privileged communication, as I understand it, under the laws of Colorado and therefore I don't intend to reveal it.
>
> Q. Is that a secret too?—A. I think I've made my answer very clear.
>
> Q. Is she away on business?—A. I don't desire to answer any questions regarding her presence, where she is at present.
>
> Q. How long has she been gone?—A. I think I will have to give you the same answer on that.
>
> Q. Is she out of the city?—A. Same answer.
>
> Q. Same answer to what?—A. Her present location is a matter of privileged communication.

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Q. What do you mean by privileged communication?—A. Well, a privileged communication, to my understanding, is a communication between a man and his wife.

* * * * *

Q. Mr. Blau, this grand jury requests the presence of your wife as a witness here and up till now you have been concealing her whereabouts and obstructing this grand jury from serving a subpoena, having a subpoena served on her. Are you going to persist in that?—A. My answer is that her whereabouts—my knowledge of her whereabouts is based on a communication which I understand is privileged under the laws of the State of Colorado, and I also understand under the federal law.

After some discussion with government counsel as to the law of privileged communications between spouses, Blau was given an opportunity to consult with counsel, but after doing so, he persisted in his refusal to answer the question (R. 55–56). Still later he again persisted in his refusal, as follows (R. 57–58):

Q. Where is your wife at the present time?—A. I refuse to answer that, as I did yesterday, on the basis that my knowledge of her whereabouts is based on a privileged communication between husband and wife.

Q. Are you fearful that your wife may be involved in a criminal action of some sort?—A. No, sir, I am not. If you can serve her with a subpoena I'm sure she will

be glad to come and testify, just as I have.

Q. Now, where do you suggest that we serve her with that subpoena?—A. I would suggest that that was your problem.

Q. You refuse to tell us?—A. Yes.

Q. You, of course, know where she is?—A. I have answered that I do.

Q. So to put your mind at rest on any reservation that you might have, I am advising you now that the only purpose of this grand jury wants your wife for is as a witness and for no other purpose. Do you still refuse to tell us where she can be served with process?—A. Yes, sir, I do. I would also like to add this, as I did before: If you can serve her I'm sure she would have no objection to come here as I did, voluntarily, after I was served to testify.

The transcript of these proceedings before the grand jury was read to the court (R. 53 et seq.). After argument before the court as to the validity of Blau's, Mrs. Rogers' and Wertheimer's claims of privilege, the court rejected the claims (R. 58–74) and when Blau persisted in his refusals to return before the grand jury and answer the questions (R. 58–59, 60–61, 74–75) he was sentenced for contempt for refusal to obey the court's order (R. 27, 75). As appears from the trial judge's certificate as to the contempt, the judgment was based upon Blau's refusal to answer questions pertaining "to the present whereabouts of his wife, Patricia Blau, whether or not he held any official connection with the Communist Party and other questions" (R. 28–29).

Patricia Blau.—She could not be found for service of a subpoena at the same time as the other petitioners, but was served later (2 R. 4). She appeared before the grand jury on January 4, 1949, but refused to answer certain questions, hereinafter discussed. The matter was thereupon presented to the court and government counsel asked that the court rule upon the propriety of the questions and, if proper, instruct Mrs. Blau to answer (2 R. 4–5). Mr. Menin represented Mrs. Blau in the proceedings before the court and at the outset his request for a recess of "about five minutes" was granted to enable him to consult with Mrs. Blau (2 R. 7). The transcript of Mrs. Blau's appearance before the grand jury (2 R. 23–27) was handed to the court and Mr. Menin (2 R. 7) and it disclosed the following:

After stating her name and address, Mrs. Blau was advised by government counsel that she was not the subject of the grand jury's investigation, but that she had been called as a witness in connection with a matter it had under investigation (2 R. 23–24). Asked if she knew the names of the state officers of the Communist Party, she replied: "The names of some of the State officers of the Communist Party of Colorado I believe are already known to you because they have testified here" (2 R. 24). She also stated that "since there are twelve leaders of the Communist Party at present under indictment under the Smith Act

in New York City by the Department of Justice, any evidence which I may give or any testimony which I may give which associates myself with any leaders of the Communist Party will therefore incriminate myself, and I therefore feel that I should not answer that question on the grounds that it may tend to incriminate me" (*ibid.*). When government counsel told her that the question did not concern her association with the state officers but only whether she knew their names, she stated: "Mr. Lilly, frankly, I have to say that if I sat down and thought about it I could remember all the names of the members of the State Committee of the Communist Party, but I do not feel that I should answer because that would directly associate me with an intimate knowledge of that State Committee" (2 R. 24–25). She was then asked if she knew the table of organization of the Communist Party of Colorado. She first replied that "The Communist Party of the United States has a Constitution by which the Communist Party of Colorado, of course, is organized," but declined to give the table of organization on the ground that to do so would imply "exactly the same intimate knowledge and association with the Communist Party." She added, however, that "It isn't anything that I have any reason to refuse to reveal; it's a very common structure, but I think that my stating that I knew exactly how the Communist Party was organized would tend, or would constitute an admission of an intimate

association" (2 R. 25). When she was asked whether she was ever employed by the Communist Party of Colorado, she replied that her "political activities have been on a voluntary basis" (*ibid.*). When counsel asked if her answer meant that she had performed services for the party, she first said, "Mr. Lilly, you get me in exactly the same spot," but added: "My political activities and beliefs are a matter of public knowledge, of public record. I am proud of them, but I feel that at this moment saying directly that I have been employed by any party is a violation of my rights under the first amendment, which says that no one is answerable to anyone for his political beliefs or associations or views" (2 R. 26).[9] She refused to answer whether she had ever had custody of any of the books and records of the Communist Party of Colorado, but did answer "No" to the question whether she then had possession of any such records (*ibid.*). She also refused to state whether she had turned over any such records to any person, the names of any persons who then might have the books and records, and to describe any books and records of the party, all on the

[9] Bary, the state party chairman, had testified before the grand jury in September, 1948, that Mrs. Blau was the secretary (*supra*, p. 7). He had also testified that Mrs. Blau collected party dues in Denver, that she was one of the persons who had custody of party records, and that she might know the location of some records which had been described before the grand jury but which he claimed he was unable to produce (R. 108, 113–114, 126–127).

ground previously asserted, to which she added the assertion that "the President's loyalty order declar[ed] the Communist Party to be an agent of a foreign power" (2 R. 26–27).

In the proceedings before the court, the questions propounded to Mrs. Blau before the grand jury were repeated and she reiterated the reasons she had assigned before that body for her refusal to answer them. Mr. Menin also introduced a copy of the conspiracy indictment in the *Dennis* case and a copy of one of the substantive indictments returned against the individual defendants in that case (2 R. 8, 27–30). The court ruled as to each question that Mrs. Blau's claim of privilege was not valid and directed that she answer. She persisted in her refusal and the court, after further argument by Mr. Menin (2 R. 16–22), adjudged her guilty of contempt (2 R. 7–8, 10–16, 23).

SUMMARY OF ARGUMENT

These cases involve the application of the privilege against self-incrimination to witnesses who were asked about their connection with the Communist Party and the location of the Party's records. It appears from the record that the witnesses were primarily concerned with preserving the secrecy of the Party records rather than concealing their own participation in Party activities.

The cases must be considered against the background of the provisions of the Smith Act (18

U. S. C. [1946 ed.] 10) and the proceedings against the leaders of the national Communist Party now pending in this Court. *United States* v. *Dennis et al.*, 183 F. 2d 201 (C. A. 2), No. 336, certiorari granted October 23, 1950.

(a) It is our position that the testimony freely given by Jane Rogers disclosed her connection with the party and that she thereby waived the privilege under the Fifth Amendment, at least in so far as membership and activity in the Party is an element of incrimination under the Smith Act. She was more concerned with protecting third persons than herself. Patricia Blau, although claiming the privilege, also volunteered testimony indicating her own familiarity with the internal affairs of the Party. It is well established that a witness cannot invoke the principle against self-incrimination in order to discontinue testimony as to transactions already disclosed by the witness, at least where the witness' testimony already has disclosed substantial elements of the crime (*Brown* v. *Walker*, 161 U. S. 591, 597). Such a rule is necessary because of the unlimited possibility for abuse which would exist if a witness were permitted to testify to only a portion of a transaction. The rule is further justified on the ground that a witness is not being compelled to be a witness against himself to an element of a crime when he has already made himself such a witness by his own testimony.

(b) With respect to Irving Blau, it is our position that his conviction may be sustained on his refusal to disclose his wife's address without reference to his refusals to testify concerning his activities with the Party. It is claimed that his refusal to disclose his wife's whereabouts was privileged on the ground that his information was based on a "privileged communication," but he failed to establish a sufficient basis for the privilege since he made no claim that the communication, if received directly from his wife, was made to him in private. Moreover, the address of a spouse is not intrinsically a matter of marital confidence and the witness himself specifically and repeatedly denied the only conjectural basis for maintaining secrecy, the possibility that she was evading a subpoena.

(c) The petitioners argue that answers to questions which tend to show membership in, or affiliation with, the Communist Party may be refused under the First Amendment as an infringement of their right of free speech. In essence, their argument is that the Amendment gives the right to remain silent, as well as the right to speak freely. It is our contention that the normal procedures of grand jury and Congressional investigations could not be carried on if such were a proper construction of the First Amendment. In this respect we rely on the recent cases of *Barsky* v. *United States*, 167 F. 2d 241 (C. A.

D. C.), certiorari denied, 334 U. S. 843; *Lawson* v. *United States,* 176 F. 2d 49 (C. A. D. C.), certiorari denied, 339 U. S. 934.

(d) Whether or not our views prevail with respect to the waiver of the privilege against self-incrimination by Jane Rogers and the absence of a privilege with respect to the testimony of Irving Blau, the issue of whether disclosure of membership in, or affiliation with, the Communist Party falls within the privilege against self-incrimination is squarely raised with respect to Patricia Blau. In view of the conflict between the various Courts of Appeals on this issue and in view of the absence of a final determination as to the applicability of the Smith Act to activities in connection with the Communist Party, we shall confine ourselves to describing the extent and basis of the conflict and the considerations which we believe are helpful in its resolution.

(e) With respect to petitioners' contentions that they were denied due process in the proceedings in the district court, it appears from the record that all requirements for the summary disposition of criminal contempt were fully observed. The petitioners were guilty of disobedience of the district court's orders to answer certain questions and thereby violated 18 U. S. C. 401, unless the answers to these questions were privileged. This misconduct occurred in the actual presence of the court and it is well established that the judge himself, knowing the full facts as to the contempt, may proceed immedi-

ately to punish the offenders. *Cooke* v. *United States,* 267 U. S. 517, 536; *Ex Parte Terry,* 128 U. S. 289, 309. Moreover, the record clearly shows that full opportunity for explanation and argument was accorded petitioners and their counsel.

ARGUMENT

Introduction.—The Smith Act (*supra,* p. 4) prohibits the teaching and advocacy of the overthrow of the Government by force or violence and the organization of any society or group of persons for that purpose. It also prohibits membership and affiliation in such an organization with knowledge of its purposes. The conspiracy indictment against the national leaders of the Communist Party in New York (*United States* v. *Dennis et al.,* 183 F. 2d 201 (C. A. 2), No. 336, certiorari granted October 23, 1950) charged that they conspired to organize the Communist Party of the United States as a society, group, and assembly of persons who teach and advocate the overthrow of the Government by force and violence (2 R. 28–30). The substantive indictments against the defendants individually, which have not been brought to trial, charged that they were at the time of the indictments members of the Communist Party of the United States, knowing that the party was a society and assembly of persons who teach and advocate the violent overthrow of the Government (2 R. 27–28).

Petitioners' principal contention is that, in view of the statute and the charges in these in-

dictments, they had the right under the Fifth Amendment to refuse to answer questions before the grand jury if their answers would tend to establish their membership in, or affiliation with, the Communist Party (Br. 11–41). Although membership in the party is not by itself a crime, it is contended that it is one of the elements which may be used to prove a violation of the Smith Act when combined with proof of the party's illegal purpose and of the individual's knowledge of such purpose.

The issue so stated raises serious implications. The court below decided against petitioner's contention, while the Fifth and Ninth Circuits, the latter by a divided court, have held to the contrary (*Estes* v. *Potter,* 183 F. 2d 865 (C. A. 5), petition for certiorari pending, No. 286; *Kasinowitz et al.* v. *United States,* 181 F. 2d 632 (C. A. 9), petition for certiorari pending, No. 136; see also the earlier opinions of the Ninth Circuit in *Alexander* v. *United States,* 173 F. 2d 867, 181 F. 2d 480, and *Doran* v. *United States,* 181 F. 2d 489).

In this case, the grand jury was seeking the local party membership records, and to that end they called before them persons who they obviously had reason to believe would know where such records could be located. Neither a party nor a witness is entitled under the Fifth Amendment to withhold such records from a grand jury, even though they might incriminate him. *United States* v. *White,* 322 U. S. 694. As appears from

the Statement, *supra*, the examination of all of the witnesses was calculated to elicit information as to the location and custody of the membership records; there was no questioning in pursuit of information as to the aims and purposes of the Communist Party. Although some of the witnesses freely answered questions as to their positions in the party without asserting the privilege against self-incrimination, when it came to divulgence of information concerning the membership records the grand jury was confronted in each instance with either an outright refusal of such information or professions of ignorance.

I

PETITIONER JANE ROGERS WAS NOT ENTITLED, AFTER FREELY DISCLOSING HER CONNECTIONS WITH THE COMMUNIST PARTY, TO REFUSE TO ANSWER QUESTIONS CONCERNING THE LOCATION AND CUSTODY OF THE PARTY'S MEMBERSHIP RECORDS

It is settled, of course, that the privilege against self-incrimination can be waived. The failure of a witness to assert the privilege while testifying constitutes a waiver. *Johnson* v. *United States*, 318 U. S. 189, 195; *United States* v. *Murdock*, 284 U. S. 141, 148; *Vajtauer* v. *Commissioner*, 273 U. S. 103, 113. Where the witness is not the defendant in a criminal prosecution,[10] there

[10] The defendant waives the privilege by taking the stand and he can be examined concerning anything relevant to the issues. *Johnson* v. *United States*, 318 U. S. 189, 195; *Raffel* v. *United States*, 271 U. S. 494.

is a substantial body of authority that testimony as to a transaction waives the privilege with respect to all other inquiries pertinent to that transaction.[11] This Court, however, has indicated that the privilege is not waived merely by testimony as to a transaction and that before the witness can be held to have waived there must be an element of incrimination in what he has disclosed. But if the witness "discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." *Brown* v. *Walker,* 161 U. S. 591, 597, and cases cited. Later, in *McCarthy* v. *Arndstein,* 262 U. S. 355, 359, this Court said that a waiver is not effected until there is an "actual admission of guilt or incriminating facts." In *United States* v. *St. Pierre,* 132 F. 2d 837, certiorari granted, 318 U. S. 751, writ dismissed for mootness, 319 U. S.

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[11] *Lockett* v. *State*, 63 Ala. 5, 11; *Graul* v. *United States*, 47 App. D. C. 543, 550; *People* v. *Freshour*, 55 Cal. 375, 375–376; *Samuel* v. *People*, 164 Ill. 379, 383; *Eggers* v. *Fox*, 177 Ill. 185, 189–190; *Stevenson* v. *Baker*, 347 Ill. 304, 319; *Ginn* v. *Commonwealth*, 15 Ky. (5 Litt.) 301; *Low* v. *Mitchell*, 18 Me. 372, 374; *Commonwealth* v. *Price*, 70 Mass. (10 Gray) 472, 476; *Mayo* v. *Mayo*, 119 Mass. 290, 292; *Evans* v. *O'Connor*, 174 Mass. 287; *State* v. *Marshall*, 36 Mo. 400; *Lombard* v. *Mayberry*, 24 Neb. 674, 691; *Neal* v. *State*, 104 Neb. 56, 58; *Amherst* v. *Hollis*, 9 N. H. 107, 110; *Coburn* v. *Odell*, 30 N. H. 540, 554–556; *State* v. *Foster*, 23 N. H. 348, 354; *State* v. *Perry*, 210 N. C. 796, 797–798; *Ex parte Park*, 37 Tex. Cr. 590; 8 Wigmore, *Evidence* (3d ed. 1940), Sec. 2276; see also *United States* v. *St. Pierre*, 132 F. 2d 837, 839 (C. A. 2), certiorari granted, 318 U. S. 751, writ dismissed for mootness, 319 U. S. 41.

41, L. Hand, J., speaking for a majority of the Second Circuit, interpreted this language as follows (p. 839);

> * * * it [i. e., this Court, in the *Arndstein* case] would seem not to have meant that the admission of nothing short of the whole crime would suffice; else it would not have spoken in the disjunctive.

Although there is this diversity of opinion as to waiver resulting from testimony not in itself incriminating, the authorities are uniform that there is a waiver once the witness admits incriminating facts. The rule was evolved out of necessity to guard against the very serious danger intrinsic in a privilege which permits a witness to testify up to a certain point and then stop. That danger arises from any unlimited opportunity for partial testimony, deceptive testimony, and the furthering of a variety of ulterior purposes unrelated to the purpose of the privilege to protect witnesses against self-incrimination, by testifying to incriminating facts and then claiming privilege against further questions or explorations related to such transactions. To deny the witness a right in such circumstances to close the door to further inquiry is consonant with the purpose of the privilege to protect him against self-incrimination. For once he has voluntarily testified to incriminating facts, it cannot be said that he is being compelled to be a witness against himself when he is only com-

pelled to finish testimony he has himself begun—when he has already become a witness against himself. It may be, as many decisions indicate, that the dangers inherent in all incomplete testimony may outweigh the need for allowing the privilege even where the witness has only testified to a transaction innocent on its face. (See pp. 25–26, *supra*.) But it is amply clear that where the transaction already testified to is itself incriminating, the purpose of the privilege is no longer to be attained and the reason for it no longer exists. These considerations were aptly articulated by Judge Learned Hand in the *St. Pierre* case, *supra*, at p. 840:

> * * * It must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition. The time for a witness to protect himself is when the decision is first presented to him; he needs nothing more, and anything more puts a mischievous instrument at his disposal. It is true that this mischief is less flagrant in an inquisitorial proceeding like an inquest before a grand jury; but the witness has no better claim to protection in one case than in the other; and his protection is the only relevant weight in the scale. The result of using this, like any other privilege,

> is to deprive people of evidence which would be otherwise available; at best a disastrous necessity, for disputes ought to be settled so far as they can be by resort to the whole truth; and when the only excuse for darkness ceases, it is shocking to shut out the light. * * *

Applying these principles to the case of Jane Rogers, we think it is clear that she waived any privilege she might initially have had in respect to the question she refused to answer, and for which refusal she was adjudged guilty of contempt. She was asked to whom she turned over the records of the Communist Party of Denver upon the expiration of her tenure as treasurer (R. 39, 77–78). She freely testified that she had been treasurer for about a year and that she had had in her possession, up to January of 1948, the records of dues collected, together with other records (R. 38). Yet she refused to disclose the name of the person to whom she turned over these books and records. Her original statement to the court of her reason for refusing to answer, though credible, is legally ineffective—"I don't feel that I should subject a person or persons to the same thing that I'm going through" (R. 39). The privilege of the Fifth Amendment is intended as a shield against self-incrimination by the witness, not as a protection for others. *Brown* v. *Walker,* 161 U. S. 591, 600. Her assertion on her third and last appearance before

the court of the privilege against self-incrimination is neither credible nor legally effective.

Assuming, as petitioners contend, that Communist Party membership and activity is in itself an element of incrimination under the Smith Act, she had already incriminated herself as to that element by her testimony as to her activities as treasurer. We need not inquire whether in these circumstances she completely waived the privilege as to all the elements of offenses under the Smith Act, for the further questioning was concerned only with locating the local membership lists, which Mrs. Rogers freely admitted were formerly in her custody. We submit that under the decisions of this Court cited above she was not entitled to refuse to disclose the identity of the person who received the records from her. Indeed, the question as to the identity of that person could not have incriminated her any more than she had, on petitioners' own hypothesis, already incriminated herself, both as to her membership and as to the activities and associations implicit in the fact that she had been a local officer of the party.

Turning to the case of Patricia Blau, we do not urge that she also waived the privilege, in view of the fact that she stoutly and repeatedly asserted that she was relying upon it both before the grand jury (2 R. 24–27) and before the district judge (2 R. 10–16). However, we call the Court's attention to the fact that almost in the same breath with which she asserted the privilege

she gave testimony which, in the absence of the claim, would be considered to waive the privilege. She asserted that she need not answer questions as to the names of the party's state officers and the table of state organization on the ground that the answers would incriminate her by disclosing her familiarity with party affairs and therefore her affiliation with it. But at the same time she admitted her knowledge of these matters by stating that she could remember the names of the members of the state committee (2 R. 25), that the party organization was "a very common structure" and that "It isn't anything that I have any reason to refuse to reveal" (2 R. 25). Moreover, when she was asked whether she was ever employed by the Communist Party of Colorado, she stated first that her "political activities and beliefs are a matter of public knowledge, of public record," and that she was "proud of them" (2 R. 26). Then she refused to answer the question. Since a previous witness, Bary, had testified that Patricia Blau was the state secretary (R. 108, 113, 121, 125), that she collected dues (R. 113, 182), and that she had care and custody of the books of the party (R. 108), and since she knew of this prior testimony (2 R. 24), her statement amounts in effect to an admission of her party activities.

In the light of Patricia Blau's professions of fear of incrimination under the Smith Act by disclosing associations in the party, thus implying

that the information sought from her involved secret party affairs, we submit that Mrs. Blau's own volunteered statements, so clearly indicating her intimate knowledge of the structure and leadership of the state party organization, divulged as well that she was at the least an active member of the organization. It might be argued that a witness should not be permitted so to abuse the privilege by claiming in one breath that an answer might be incriminating and in the next volunteering equally incriminating testimony.[12] However, the constitutional protection against self-incrimination is not one that should be held to have been waived by inferences or doubtful presumptions. See *Wood* v. *United States,* 128 F. 2d 265, 277 (C. A. D. C.). In this respect the case of Patricia Blau is to be contrasted with that of Jane Rogers where the waiver was based on unqualified testimony freely given without any claim of privilege.

II

NO INTERFERENCE WITH RIGHTS UNDER THE FIRST AMENDMENT IS INVOLVED IN PETITIONERS' CONVICTIONS

Petitioners contend (Br. 41–47) that they were privileged under the First Amendment to refuse

[12] "Although the question asked may not tend to incriminate, a waiver of the privilege may be effected by the witness in disclosing incriminating matter not responsive to the question." 8 Wigmore, *Evidence*, 3d ed. 1940, sec. 2276, 1949 Supp.

to answer the questions propounded to them. However, only Patricia Blau interposed the First Amendment as a basis for her refusal, and then only as to the question whether she had ever been employed by the party (2 R. 13, 25–26). Be that as it may, petitioners' argument is in essence that the questions asked of the witnesses were designed to disclose their membership in or affiliation with the Communist Party, were therefore an inquiry into their political beliefs, and as such were forbidden by the First Amendment as abridging the freedom of speech. This argument has lately been frequently before the courts. *United States* v. *Josephson,* 165 F. 2d 82, 88–92 (C. A. 2), certiorari denied, 333 U. S. 838; *Barsky* v. *United States,* 167 F. 2d 241, 244–250 (C. A. D. C.), certiorari denied, 334 U. S. 843, rehearing denied, 339 U. S. 971; *Eisler* v. *United States,* 170 F. 2d 273, 279 (C. A. D. C.), certiorari dismissed, 338 U. S. 883; *Dennis* v. *United States,* 171 F. 2d 986, 987–988 (C. A. D. C.), certiorari granted, limited to a different question, 337 U. S. 954, affirmed, 339 U. S. 162; *Marshall* v. *United States,* 176 F. 2d 473, 474 (C. A. D. C.), certiorari denied, 339 U. S. 933; *United States* v. *Gates,* 176 F. 2d 78 (C. A. 2); *Morford* v. *United States,* 176 F. 2d 54 (C. A. D. C.), reversed on another ground, 339 U. S. 258, affirmed after retrial, — F. 2d —, petition for certiorari pending, No. 272; *Lawson* v. *United States,* 176 F. 2d 49, 51–52 (C. A. D. C.), certiorari denied, 339 U. S. 934. In all of these

cases the position here asserted by petitioners was repudiated.

The cases relied on by petitioners in their brief are, in our view, inapposite. In each of those cases the court was concerned with the effect of legislative, executive, or judicial action which imposed a restraint upon speech, the press, or assembly, or which punished individuals for having published their views or for having joined an association, or which required adherence to a belief. No such effect, self-incrimination aside, could arise from demanding answers to the specific questions involved here.

Whether or not the First Amendment embodies a freedom to be silent generally, it certainly does not give witnesses before a legally constituted grand jury a privilege to be silent when called upon to testify. No investigation or court proceeding at which witnesses were compelled to testify would be constitutional if that were the case. We respectfully refer the Court to our discussion of this point in our brief in opposition in *Lawson* v. *United States* (Nos. 248, 249, O. T. 1949, pp. 14–20).[13]

[13] The petitioners' argument that the refusals to testify were justified by the prohibition in the Fourth Amendment against unreasonable searches and seizures (Br. 47–52) is but another facet of the same argument and requires no separate discussion.

III

PETITIONER IRVING BLAU'S CONVICTION IS VALID UPON THE BASIS OF HIS REFUSAL TO ANSWER AS TO HIS WIFE'S WHEREABOUTS

As we pointed out in the Statement, *supra*, p. 15, the judgment of contempt as to petitioner Irving Blau was based both upon his refusal to answer questions as to the whereabouts of Patricia Blau and upon his refusal to answer questions concerning his connections with the Communist Party. Hence, the general sentence imposed upon him is valid if his claim that his knowledge of his wife's wherebouts was based upon a privileged communication was validly rejected by the District Court, irrespective of the validity of the other basis of the judgment. *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

In respect to the questions as to the whereabouts of his wife, Blau repeatedly claimed, both before the grand jury and court, that his knowledge was "based on a privileged communication" (R. 55–56, 57, 58–60). Asked what he meant by a "privileged communication," he replied that it was "a communication between a man and his wife" (R. 55). He also stated (and repeated the testimony at least twice again) that if his wife were served with a subpoena, "I'm sure she will be glad to come and testify" (R. 57, 58, 60). But when he was asked where the subpoena could be

served, he replied: "I would suggest that that was your problem" (R. 57).

What Blau did not say is perhaps more significant than what he did say. Nowhere in his testimony did he state how the communication was made, never referring to it as a letter or telephone call, for example. Nowhere did he assert that the alleged communication was from his wife directly or was made to him in private, and there is nothing in the nature of the information communicated which would lead to the inference that it would be cloaked in secrecy. It is entirely possible that the message came to him orally through a third person, or that Patricia Blau told him of her destination in the presence of third persons. If the communication had been made by letter or telephone, it seems almost inconceivable that Blau would not have so indicated. His failure to do so leads to the inference that some other mode of communication was utilized.

The principles governing resolution of the question of the validity of Blau's claim were stated in the leading case of *Wolfle* v. *United States*, 291 U. S. 7, 14, 17:[14]

[14] Our discussion is limited to privileged marital confidences, as distinguished from the marital disqualification or the privilege of one spouse not to testify against the other. The disqualification and the privilege not to testify against one's spouse were not discussed or asserted in the proceedings except, perhaps, in the one remark of Blau (R. 59): "I need not give evidence against my wife." The privilege does not apply here, for neither Mrs. Blau nor, for that matter, any

> Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication. See *Caldwell* v. *State,* 146 Ala. 141, 143; 41 So. 473; *Parkhurst* v. *Berdell,* 110 N. Y. 386, 393; 18 N. E. 123; *Truelsch* v. *Miller,* 186 Wis. 239, 249; 202 N. W. 352. * * *
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> * * * The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved. * * *[15]

With these considerations in mind, the record discloses the absence of the requisite basis for

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of the witnesses before the grand jury in its investigation were parties to any proceeding. Furthermore, Blau did not consider his testimony as adverse for he answered "No" to the court's question, "You think it is testimony against her that you won't tell where she is?" (R. 58). See 8 Wigmore, *Evidence*, 3d ed (1940) sec. 2334.

[15] Cf. *Nardone* v. *United States*, 308 U. S. 338, 340: "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped." Blau is mistaken in his contention (Br. 64–65) that the Colorado law, which he claims supports him, is applicable. For as this Court also pointed out in the *Wolfle* case (pp. 12–13), citing *Funk* v. *United States*, 290 U. S. 371, such matters are governed by "common law principles as interpreted and applied by the federal courts in the light of reason and experience." This rule is now codified in Rule 26, F. R. Crim. P.

invoking the claimed privilege. The very careful choice of words employed by Blau (and by his counsel in arguing the matter before the court, R. 61) failed to establish, either directly or by implication, that the alleged communication from Mrs. Blau was "privately made," as required by the rule of the *Wolfle* case. Petitioner argues that the burden was on the Government to show that the communication between him and his wife was not intended to be confidential. This is good law when a witness has established the basic fact that the communication was made in private (8 Wigmore, *Evidence* (3d ed.), pp. 640–641). But no presumption of confidence attaches to statements openly made in the hearing of others or communications transmitted through outside emissaries. The very fact of such disclosure by the person initiating the communication negatives the implication that he intended it to be confidential. Therefore, even though a communication made in private may not be intended to be confidential because of its content or intended use, and although it is proper to put the burden of establishing such facts on the Government, the court can never come to that problem if the witness does not first lay the basis for the presumption by showing that the communication was in fact made in private.

Secondly, the information sought—the whereabouts of a person—is not intrinsically confiden-

tial. The only reason why Patricia Blau could have intended her communication to be confidential was to avoid the service of the subpoena. Irving Blau negatived this possibility by repeated statements that she would have no objection to testifying (R. 57, 58, 60).[16]

We submit that a person's presence anywhere is normally and necessarily a matter known to at least a few persons other than the spouse, and is ordinarily known to many persons. As was stated by the Court of Appeals (R. 305), "It is difficult to imagine anything less private or confidential than the address of a husband or wife." When there is added to this aspect the further, thrice-repeated testimony of Blau negating the only conceivable reason for secrecy—the desire to evade process—there is eliminated even the possible initial assumption that might have arisen had Blau asserted that the alleged communication was "privately made."

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[16] Irving Blau's claim that Patricia Blau was not avoiding the necessity of testifying is supported by the statement of her counsel who stated to the District Court: "May I, for the purpose of the record, * * * point out that this woman did not defy any subpoena issued by this Court. This woman was ill and was away and was not aware of the proceedings that were pending here. She had communicated with her husband b he did not communicate to her that she was wanted. When she came back to Denver she went to the post office to get some mail and it was then that she was served with the subpoena, and she immediately accepted it. I think for the Court to assume something that did not exist and upon which there is no evidence is entirely improper" (2 R. 36).

The unlikelihood of marital secrecy about a wife's whereabouts is further attested by the paucity of decisions in which privilege has been asserted on any such ground. Petitioner has not presented a single decision invoking the privilege with respect to a spouse's address. We have found one decision in point, and it is clearly contrary to his contention. In *Yoder* v. *United States,* 80 F. 2d 665 (C. A. 10), a husband left a note for his wife, stating that he was in a certain town. The court held, on the authority of *Wolfle* v. *United States, supra,* that both "the method and the nature of this communication demonstrate that there was nothing confidential about it" (p. 668) and that it was rightly admitted in evidence. The court there had to weigh the various probabilities, just as is required here. As to the method of communication, the court surmised that the note, being on a large cardboard, was doubtless left in a conspicuous place, but the court did not consider that it was necessary that any outsider actually saw the note or was intended to see it. As to "the nature" of the communication—the furnishing of an address—the court's decision obviously found nothing confidential in such information. And it is to be noted that the case involved a state of facts more likely than here to indicate marital confidence; the possible assumption of secrecy was

not negated, as here, by definite testimony eliminating one possible ground for secrecy.[17]

There is substantial support in other decisions for the rationale of the holding in the *Yoder* case. The decisions cited in the *Wolfle* case (*supra*, p. 37) show that even where a communication is "privately made" (a requisite which does not affirmatively appear here) the information itself may nevertheless be of such nature as is too far removed from a marital confidence. Thus, in *Caldwell* v. *State*, 146 Ala. 141, 41 So. 473, letters of a husband to a wife were admitted against the husband in a bigamy prosecution on the ground that the "only tendency of the letters was to show the relation" (p. 143). The marriage relation was obviously public in nature although the defendant husband desired it to be secret, at least at the time of the bigamy trial. Similarly, in *Parkhurst* v. *Berdell*, 110 N. Y. 386, 394, 18 N. E. 123, the court pointed out that conversations between husband and wife as to the husband's obligations to a certain woman for certain securities and as to the husband's promise to secure the woman therefor, were proper subjects of testi-

[17] The fact that the information as to whereabouts in *Yoder* v. *United States* was false had nothing to do with the holding that the communication was not confidential; the court did not refer to this falsity aspect of the communication. In *United States* v. *Walker*, 176 F. 2d 564 (C. A. 2), certiorari denied, 338 U. S. 891, a flagrantly deceptive letter was held privileged because the court thought it was of a truly intimate nature.

mony by the wife. The court characterized the conversations as "ordinary conversations relating to matters of business which there is no reason to suppose he would have been unwilling to hold in the presence of any person." *Truelsch* v. *Miller,* 186 Wis. 239, 202 N. W. 352, the other case cited in the *Wolfle* case, points out yet another element held to overcome any assumption that a certain communication between spouses is a marital confidence. That element is the instruction or expectation that the alleged confidence is to be transmitted to others. In that case a suicide note of a husband to his wife was held not privileged, since it contemplated some disclosures to be made by his wife to his employer.[18] A number of authorities have also

[18] For further authorities in which business disclosures or disclosures otherwise contemplated to be known by others were not deemed to be marital confidences, see *N. Y. Life Insurance Co.* v. *Mason*, 272 Fed. 28 (C. A. 9) (in which the applicable statute referred to *all* communications between spouses but was held to apply only to confidential communications); *Kansas City Life Insurance Co.* v. *Jones*, 21 F. Supp. 159 (S. D. Cal.); *Dobbins* v. *United States*, 157 F. 2d 257 (C. A. D. C.), certiorari denied, 329 U. S. 734; *Appeal of Spitz*, 56 Conn. 184, 14 Atl. 776; *Brooks* v. *Brooks*, 357 Mo. 343, 208 S. W. 2d 279; *Hester* v. *Hester*, 15 N. C. (4 Dev.) 228; *Clements* v. *Marston*, 52 N. H. 31, 38 (the privilege is limited to "something confided by one to the other, simply and specially as husband or wife"); *Sackman* v. *Thomas*, 24 Wash. 660; 64 Pac. 819 (another case in which the applicable statute referred to *all* communications between spouses but was held to apply only to confidential communications); 8 Wigmore, *Evidence*, 3d ed., sec. 2336, pp. 640, 642; 4 A. L. R. 2d 835.

pointed out that since a husband and wife can have separate property, discussions concerning such property are no longer marital confidences, *per se.* See *Kansas City Life Insurance Co.* v. *Jones,* 21 F. Supp. 159 (S. D. Cal.); and *Sackman* v. *Thomas,* 24 Wash. 660, 64 Pac. 819.

We submit that a wife's whereabouts, similarly, is generally a public matter and no more a subject of marital confidence than the matters involved in these cases.

In summary, there is no showing that the information as to the whereabouts of Mrs. Blau came to petitioner by reason of a "privately made" communication, or that the information was intrinsically of a sort that is a matter of marital confidence. Nor is there any indication that Mrs. Blau's whereabouts was a matter of marital confidence by reason of any special circumstances, and there is, in fact, sworn testimony indicating the contrary.

The basis for refusal to answer is more consistently explained as arising from a desire to shield the Communist Party records rather than from any marital basis. It is also significant, as bearing upon Blau's good faith in claiming the privilege of marital confidence as to his wife's whereabouts, that he interposed the same objections to the earlier question whether she held any position in the party (R. 53). As evidenced by Bary's contemporaneous testimony (*supra,* pp. 18, 31) and by Patricia Blau's own later testi-

mony (*supra*, p. 18), her position was well known and therefore could not possibly have been a matter of a marital confidence.

IV

COMPELLING ANSWERS TO QUESTIONS WHICH TEND TO SHOW MEMBERSHIP IN, OR AFFILIATION WITH, THE COMMUNIST PARTY RAISES A SERIOUS ISSUE ON SELF-INCRIMINATION

With respect to Jane Rogers, we have contended that the basic question of self-incrimination need not be faced, since we believe she waived that privilege (*supra*, pp. 25–30). With respect to Irving Blau, the conviction can be sustained on the ground that his refusal to state his wife's whereabouts was not properly based on the privilege against disclosing confidential communications (*supra*, pp. 35–44). However, with respect to Patricia Blau we do not urge that she waived the privilege against self-incrimination, although the matter is not without doubt. Probably her case stands or falls on whether a witness may be compelled to answer questions which tend to show membership in, or affiliation with, the Communist Party.

A conflict exists between the decisions of the court below, the Tenth Circuit, holding that disclosures involving Communist Party connections are not self-incriminating (R. 297–306, 2 R. 40–42) and the decisions of the Courts of Appeals for the Fifth and Ninth Circuits holding to the contrary,

the latter by a divided court (*Kasinowitz* v. *United States,* 181 F. 2d 632 (C A. 9), petition for certiorari pending, No. 136; see also the earlier opinions in the Ninth Circuit in *Alexander* v. *United States,* 173 F. 2d 867, 181 F. 2d 480 (C. A. 9), and in *Doran* v. *United States,* 181 F. 2d 489 (C. A. 9); *Estes* v. *Potter,* 183 F. 2d 865 (C. A. 5), petition for certiorari pending, No. 286).

The Tenth Circuit, in dealing with these cases, first stated the generally accepted principle that a witness cannot be compelled to give testimony which would incriminate him or would disclose a link in the chain of evidence necessary to convict him of a crime, citing *Burr* v. *United States,* 25 Fed. Cases, 14,692e; *Counselman* v. *Hitchcock,* 142 U. S. 547; *Brown* v. *Walker,* 161 U. S. 591; *Ballman* v. *Fagin,* 200 U. S. 186; and *Mason* v. *United States,* 244 U. S. 362 (R. 299–301). The court went on to state (R. 301):

> From an analysis of these cases, we conclude the rule to be that the witness is not the sole judge as to whether his answer will tend to incriminate him; that when the question arises, it is for the court to determine from all the facts whether the question is of such a nature as might reasonably be expected to incriminate the witness, depending upon the answer thereto. If there is reason to believe that the answer might tend to incriminate the witness, he cannot be compelled to answer; neither can he be required to state why the

> answer might tend to incriminate him, because that would in itself to some extent constitute giving testimony against himself. Furthermore, a witness may not be required to give an answer which furnishes a link in a chain which would enable the Government to obtain the facts showing his guilt of a crime. It is also clear, from all the cases, that a witness may not refuse to answer because his answer might tend to incriminate others.

However, the court pointed out that under *Brown* v. *Walker, supra,* the privilege must not be put forward "for the real purpose of securing immunity to some third person" (R. 300) and that under *Mason* v. *United States,* "a refusal to answer, based upon a mere possibility of danger, would be to convert a salutary protection into a means of abuse" (R. 301).

The court did not find it necessary to decide the issue with respect to Jane Rogers or Irving Blau, but came face to face with it in the case of Patricia Blau. In that case it stated (2 R. 42):

> The status of the Communist Party of the United States is somewhat shrouded with uncertainty and confusion. There have been expressions of numerous ones holding high official positions that the Communist Party is dedicated to the forcible overthrow of the Government and is, therefore, an unlawful organization. However, the decisions of the courts presently are to the effect that membership in the Party is

> not of itself an offense [citing *Schneiderman* v. *United States*, 320 U. S. 118; *Dunne* v. *United States*, 138 Fed. (2d) 137].
>
> These appellants did not base their refusal to answer the questions on the grounds that their answers might tend to incriminate them within the scope of the grand jury investigation. Rather they based it upon the ground that admitting their membership in, or connection with, the Communist Party constituted a criminal offense and subjected them to criminal prosecution. In this, they were wrong and they were therefore not warranted in refusing to answer.

The decision in the Ninth Circuit, *Kasinowitz* v. *United States*, 181 F. 2d 632, involved three appeals from judgments in criminal contempt. The judgments were reversed by a divided court, four-three. There was, moreover, no majority opinion. Chief Judge Denman, speaking for himself and two others, favored reversal, and another judge concurred in the result. Judge Denman's opinion adverted to the facts that the appellants were three of a group of thirty persons chosen by the United States Attorney because he thought he could obtain from them the whereabouts of the membership records; that witnesses other than the appellants had been asked questions as to possible party purposes to overthrow the government by violence; that the Attorney General, the month before, had classified the "Communist Party U. S. A." as one seeking to

alter the form of government by unconstitutional means, and had included local branches, and that a committee of the California legislature had taken similar action; that the appellants had earlier been committed for civil contempts for failure to answer questions concerning the names of local party officers and the local table of organization;[19] and that newspaper articles (apparently concurred in by the United States Attorney) had indicated that the particular investigation was only the beginning of more far-reaching proceedings. Judge Denman also referred to the provisions of the Smith Act. It was held that the witnesses were privileged with respect to questions as to the business and occupation of one Dorothy Healy,[20] and as to her husband's occupation, since such witnesses could form a reasonable apprehension from the facts and these questions. Judge Denman declared that the issue was not the existence of the various facts but whether the witnesses "had reasonable grounds for believing that the facts might be true." 181 F. 2d 632, 636, citing *United States* v. *Weisman,* 111 F. 2d 260, 262; *United States* v. *Cusson,* 132 F. 2d 413, 414, and *United States* v. *Zwillman,* 108 F. 2d 802, 803, all in the Second Circuit.

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[19] These orders were reversed in *Alexander* v. *United States,* 181 F. 2d 480 (C. A. 9), cited *supra.*

[20] Dorothy Healy was named as organizing secretary of the Los Angeles County Section of the Communist Party in some of the evidence.

The decision of the Fifth Circuit in *Estes* v. *Potter,* 183 F. 2d 865, involved an appeal from a conviction of contempt for refusal to answer questions, *inter alia,* as to whether the witness knew certain aliens, whether the aliens were members of the Communist Party, whether they contributed funds to the Party, and whether they attended Party meetings. The questions were asked in a proceeding (before an immigration inspector) to ascertain whether the aliens were members of or affiliated with the Communist Party and therefore subject to deportation under Title 8, U. S. C., Sec. 137, subdivisions (e) and (g). The Court of Appeals held that the witness' claim of privilege rested upon a "reasonable fear of prosecution" under the Smith Act, pointing out that the answers to the questions might tend to show the witness' membership in, or affiliation with, the party; and that in the same proceeding it was being contended, as a ground for deportation, that the Party is a group encouraging overthrow of the Government by force.

As pointed out above, the resolution of this conflict between the Courts of Appeals is made difficult by the absence of a final answer to the applicability of the Smith Act to the Communist Party. If the conviction of the national leaders of the Communist Party in the District Court for the Southern District of New York which was affirmed by the Court of Appeals for the Second Circuit in *United States* v. *Dennis,* 183 F. 2d 201

(certiorari granted October 23, 1950), should be reversed by this Court on constitutional grounds support would be given to the position of the Tenth Circuit. Affirmance in the *Dennis* case might lead to the opposite conclusions, that answers to questions as to the Communist Party form links in an incriminating chain.

We contend in the *Dennis* case that the rulings made by the Court of Appeals for the Second Circuit on the constitutionality of the Smith Act are correct and should be affirmed. In view, however, of the fact that these questions are pending in this Court and have not yet been finally determined, and in the light of the existing conflict between the circuits as to the right to claim the privilege against self-incrimination with respect to testimony disclosing knowledge of the internal affairs of the Communist Party in the absence of waiver, we submit the problem of the availability of the privilege as to testimony relevant to violations of the Smith Act for such action as the Court may determine.

V

PETITIONERS WERE NOT DENIED DUE PROCESS

Petitioners' claim that they were denied due process (Br. 53–61) is based, in substance, on three contentions: that the Government should have served formal charges; that they were not accorded reasonable opportunity to defend; and that they were denied effective assistance of coun-

sel by reason of the asserted effect upon counsel of the District Court's warnings that if he did not refrain from further interruptions "sterner measures" or "custody" might be invoked.

The first argument overlooks the fact that the Blaus' contempts were committed, not before the grand jury, but in the actual presence of the judge, and that Jane Rogers' contumaciousness occurred in both places. This fact as to disobedience of the judge's direction was stated in each judgment (R. 7–8, 27; 2 R. 36–37) and was set forth in detail in the certificate of the judge filed with respect to each of the petitioners (R. 9–16, 28–36; 2 R. 3–4). In view of the judgments and certificates, we are at a loss to understand petitioners' contention (Br. 54–55) that these were not summary contempt proceedings because the certificates required under Rule 42 (a), F. R. Crim. P., were not filed. The judgments and certificates constitute full compliance with Rule 42 (a).[21]

[21] "(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

The fact that in his certificates in Jane Rogers' and Irving Blau's cases the judge referred to 28 U. S. C. 2245 rather than Rule 42 (a) is at most a technical defect. The sufficiency of the certificates under the rule is not vitiated by reason of the fact that they may have been designed to serve another purpose as well.

In the Blaus' cases the basis of the refusals to answer questions before the grand jury was a claim of privilege (R. 72). Such a claim does not constitute contempt. In Jane Rogers' case it does not appear that she asserted the privilege against self-incrimination before the grand jury; the claim was interposed before the court's final direction that she must answer. In each case the question of privilege was presented to the court, the only tribunal having authority to decide it, for resolution. In each case the petitioner was apprised by the court that the claim of privilege was invalid and was directed to answer the questions. In each case the petitioner, despite the court's ruling on the claim of privilege, refused in the presence of the court to obey its direction. In none of the cases does the record indicate the slightest question as to the nature or details of the misconduct. The misconduct occurred under the eye of the court, was actually observed by it, and disrupted the business of the court and the grand jury, an arm of the court. This disobedience of the court's order clearly constituted contempt, then and there, in the actual presence of the judge in open court and as such it was punishable summarily under Rule 42 (a) and 18 U. S. C. (1948 rev.) 401 and 402.

> It results from what has been said that it was competent for the Circuit Court, immediately upon the commission, in its presence, of the contempt recited in the

order of September 3, to proceed upon its own knowledge of the facts and punish the offender, without further proof and without issue of trial in any form *Ex parte Terry*, 128 U. S. 289, 309.[22]

This also disposes of petitioners' remaining contentions that they were denied an opportunity to defend themselves and that their counsel was unduly hampered. These arguments are, furthermore, refuted by the record which shows that counsel in these cases was given ample opportunity to defend his clients.[23]

Jane Rogers first refused the court's direction to answer questions before the grand jury on September 21, 1948. Her claim of privilege was a purported right to shield others from testifying before the grand jury (R. 39). The court allowed her until the following day for consultation

[22] Rule 42 (a) "is substantially a restatement of existing law, *Ex parte Terry*, 128 U. S. 289; *Cooke* v. *United States*, 267 U. S. 517, 534." Note of Advisory Committee to Rule 42 (a). In the *Cooke* case the Court elaborated upon the disinction between contempt of a court's authority occurring in open court in the actual presence of the judge, as here, and misbehavior outside the judge's actual presence, although within the court's constructive presence, i. e., within the vicinage of the court, as in *Savin, Petitioner*, 131 U. S. 267. See also *In re Oliver*, 333 U. S. 257, 273–276; *United States* v. *Mine Workers*, 330 U. S. 258, 331, opinion of Black and Douglas, JJ. Only in the latter type of case is notice and hearing required. This distinction is codified in subdivisions (a) and (b) of Rule 42.

[23] In view of the nature of the contempts, petitioners' assertions as to the purpose of the grand jury's investigation (Br. 6–7) are entirely irrelevant.

with counsel (R. 40) and on that day, September 22, 1948, Mr. Menin appeared on behalf of Jane Rogers and the witness Wertheimer and extensively argued before the court with respect to the privilege of self-incrimination (R. 43–49). Thereafter, he expressed the opinion with respect to Jane Rogers that she would "purge herself of her contempt by answering the questions" (R. 49).

On the following day, September 23, 1948, Jane Rogers and Irving Blau were brought before the court. Blau claimed the privilege against self-incrimination and, as to the questions concerning his wife's whereabouts, claimed a privilege on the ground of a marital communication. Extended argument was heard by the court from both Mr. Menin, representing Irving Blau and Jane Rogers, and from Blau as to both privileges (R. 59–73), although the subject of self-incrimination had already been argued the day before. The court rejected both claims and, when Blau defied the court's order that he must answer the questions, the court adjudged him guilty of contempt and sentenced him. In respect of Jane Rogers, despite the preceding day's expressed expectation by Mr. Menin that she would answer the questions that had been read in court, she again refused to answer, and for the first time asserted the privilege against self-incrimination (R. 77). The question of the privilege had by this time already been twice argued before the court, as pointed out above, and the court proceeded to sentence her without hearing a third argument of the question.

Before Patricia Blau was brought before the court for her refusals to answer questions on January 4, 1949 (2 R. 16), it appears of record that, not only had the court heard the above arguments on the claim of privilege against self-incrimination from the same lawyer, but there had intervened, on October 12, 1948, on behalf of other witnesses, yet another very extensive argument of this claim and the claim of privilege under the First Amendment, again by Mr. Menin and another attorney assisting him (R. 230–238; 278–294). Nevertheless, when Patricia Blau's case was heard, the court again heard argument by Mr. Menin (2 R. 17–22), as well as a prepared statement by Patricia Blau (2 R. 32, 33).

Thus the record shows that ample opportunity was given for argument before the court. It also reveals changes of position, delays, and obstruction by petitioners. Brief passages, cited by petitioners out of context, make an occasional effort of the court to expedite the proceedings, or to terminate endless repetition, appear much more summary than was actually the case. Thus, the statement (Br. 10) that Irving Blau "was permitted to consult with his counsel for five minutes, after which petitioner was summarily sentenced without the Court permitting counsel to be heard," obscures the facts that both counsel and Blau had already been heard in extensive argument (R. 59–74), that in the instant before sentence Blau had asked "a few minutes to con-

sult with my counsel at this time" (R. 75), and that upon being allowed five minutes had failed to return with his counsel, who then wished to argue further while Blau was outside "consulting with one of his friends" (R. 75).

We submit that petitioners were accorded every right to which they were entitled in a proceeding of this kind involving contempt of the court's authority in the actual presence of the judge in open court. In such a case, "Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and *the punishment imposed is due process of law.*" *Cooke* v. *United States,* 267 U. S. at 534. [Italics supplied.]

CONCLUSION

For the reasons stated, we respectfully submit that the judgments of the Court of Appeals should be affirmed with respect to Jane Rogers and Irving Blau. As to Patricia Blau we have set forth above the considerations which we believe will help the Court in reaching a decision.

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OCTOBER 1950.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO. 20

JANE ROGERS, *Petitioner*,

vs.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

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IN THE

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OCTOBER TERM, 1950

NO. 20

JANE ROGERS, *Petitioner*,

vs.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The petitioner, Jane Rogers respectfully petitions this Honorable Court for rehearing and reconsideration of the majority opinion entered herein on the 26th day of February, 1951, and respectfully shows:

First

The Court overlooked or misapprehended the facts regarding the circumstances under which Petitioner answered certain questions before the grand jury.

The Court overlooks that portion of the record wherein it appears that the conduct of the United States Attorney in charge of these proceedings in the trial court made unwarranted assurances to the petitioner which might well have misled her into making certain answers. This situation was taken cognizance of by the Court of Appeals in the Tenth Circuit (R 302) and was also referred to by the Ninth Circuit in *Alexander vs United States* 181 Fed. 2d 480 at page 486.

> "DENMAN, Chief Judge, individually supplementing the courts opinion: In connection with the selective character of the group of appellants, as well as in connection *with the assurances* of the Assistant Attorney General to each of those so selected and to those *of the Tenth Circuit that he was not under investigation by the grand jury****."

and at page 487

> "Of course, neither the Attorney General***nor the Solicitor General directly in charge of the cases could have known of the assurances given by their Assistant Attorney General to the appellants here and those in Denver, Colorado, to the effect that their examination *was not aimed at them***."

Since this Court relies on *Brown vs Walker* 161 U. S. 591, we call attention to the fact that in *Brown vs Walker* the court indicates the existence of a *voluntary intention* to waive the privilege. In the *Brown vs Walker* case the court uses the language

"if the witness himself *elects* to waive his privilege." (Italics ours) Can it be said that the representations of governments's counsel which lulled the petitioner into a sense of security and which amounts to ensnaring the petitioner constitutes a waiver? Besides in *Brown vs Walker, supra*, at 597 if the witness elects to disclose "his criminal connections, he is not permitted to stop, but must go on and make a full disclosure", and in *McCarthy vs Arndstein* 262 U. S. 355 this court held in effect that *a waiver is not effected* until there is an actual "admission of guilt or incriminating facts."

This court in note 12 to the majority opinion says: "Membership in the Communist Party was not, of itself, a crime at the time the questions in this case were asked." Is it not inconsistent, therefore to say, that petitioner must be held in contempt of court for refusing to make a full disclosure after having admitted "guilt or incriminating facts", while at the same time saying that the admission of membership, which would constitute the guilt or incriminating facts, "was not of itself, a crime***."?

Thus when this court quotes from *Foster vs People* 18 Mich. 266 to the effect that:

> "(W) here a witness has voluntarily answered as to materially criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate. 18 Mich. at 276.",

it is misapplying the law to the facts because the petitioner did not voluntarily answer any questions nor did she elect to waive any rights, nor did her conduct indicate an intent to waive anything. She was in fact entrapped into answering questions by the representations of government counsel. Also it will be noted

that the situation did not yet exist where petitioner had already "voluntarily answered as to materially criminating facts."

We are not disputing the correctness of the rule this court set out in the majority opinion that "where criminating facts have been *voluntarily revealed*, the privilege cannot be invoked to avoid disclosure of details." But to make the rule applicable there must actually be a disclosure of some criminal act or incriminating circumstance voluntarily made, before it can be said that the privilege is waived. But where, we ask, are the facts which makes the rule applicable in this case?

On the other hand, "A witness need only show that his answers are likely to be dangerous to him." *(Estes vs Potter* 183 Fed. 2d 865, Cert. denied 71 S. Ct. 356) [1] in order to claim the privilege. Certainly the trial court was sufficiently appraised of the possible danger to petitioner at the time she claimed the privilege.

In the closing remarks of the majority opinion the court points out that "one person may be convicted of conspiracy with persons whose names are unknown." We agree that such is the law but what the court overlooks is that one person *cannot be convicted of conspiracy unless the acts of that person are known, as well as the unlawful manner in which that person acted in conjunction with the unknown persons* in committing the conspiracy? That is what the government might have been able to establish or might have found the lead to establish had the petitioner proceeded to give the testimony sought from her.

Further, we are at a loss to understand the meaning of the expression "pure afterthought" as used in the majority opinion. What difference does it make when the thought came to the

1. It was based on the fact that *Estes vs Potter* conflicted with the rulings in the Tenth Circuit that Certiorari was here granted. See *Blau vs United States* 340 U. S. 159, 71 S. Ct. 223

petitioner? The fact is, and a perusal of the record will indicate, that petitioner made the claim of privilege after being advised by counsel of her rights. We deem that to be perfectly proper. Is it not the function of a lawyer to advise his client of the rights and privileges he has? The petitioner knew she had some rights in these proceedings, she didn't know how to claim those rights but did properly assert them in court after being advised by counsel, and at the earliest opportunity after consulting counsel.

The inapplicability of the case of *United States vs White* 322 U. S. 694, 64 S. Ct. 1248 becomes apparent when one considers that the Smith Act has not been invoked by the government against labor unions and also because before one can become a member of the Communist Party there must exist *in the mind* of that person an ideological compatability to Marxist-Leninist Principles. This government has charged that a dedication to such principles by persons amounts to a conspiracy to overthrow the government of the United States by force and violence.[2] When we deal with matters of the mind we deal with individuals. Incidentally it might be added that for government to search out matters of the mind may well tread on sacred rights.[3]

True, counsel stated to the trial court that petitioner would go back to the grand jury room and answer questions as the decision indicates, but where, we ask, did counsel indicate that she would answer incriminating questions or questions she had reasonable grounds to believe would tend to incriminate? It will also be noted at page 77 of the record that government counsel advised petitioner she would have to answer questions "except those which would incriminate for a federal offense***."

2. See indictments in New York Communist Conspiracy trial (R 93)
3. See Brief for Petitioner pages 41 to 52.

Government counsel did not consider anything which had been said by petitioner as incriminating nor did the trial court (R 78). The fact is that this petitioner was not convicted in this case because she had made certain disclosures which were incriminating or admitted a criminal offense and then refused to make further disclosures. *In this case both government counsel and the trial court did not consider any privilege to have been waived but that the privilege just didn't exist.*

Now we find ourselves confronted with this court ruling that she had a right to claim a privilege but lost it. *In the trial court the petitioner is convicted for claiming a privilege she didn't have. This court sustains the conviction because she didn't claim a privilege she did have.* To put it another way both the trial court and this court come to diametrically opposite conclusions but the petitioner still goes to jail.

We submit that this court did not properly perceive the facts and misapprehended the situation which existed in the trial court thus misapplying the law herein.

Second

The Court entirely overlooked the Petitioner's showing, in the Brief as well as on oral argument, that due process of law was denied Petitioner.

Petitioner complained that the Court of Appeals glossed over the showing that petitioner was denied due process of law by merely pointing out that:

> "The proceedings before the trial court were in some manner irregular and leave much to be dseired***" (R 298).

Yet this court which traditionally protects the right of all litigants against a denial of due process completely overlooks and remains silent on that issue. Counsel on oral argument called attention to the court the following (R 76-78) which actually appeared in the government's brief on pages 11 and 12 and is also made part of the appendix to the dissenting opinion.

"The Court: . . . What is the next case? Can we *dispose* of these ladies now? (Italics ours.)

"Mr. Goldschein (Special United States Attorney): Mrs. Jane Rogers.

"The Court: Is she here?

"Mr. Goldschein: She is here, yes sir. Now, may it please Your Honor—

"The Court: Step over here, madam. What is the status of her case?

"Mr. Goldschein: Mrs. Rogers refuses to answer the questions propounded to her in the grand jury room. She was brought back on yesterday, but says that she will answer one question but will not answer any others, and was advised that it would be necessary for her to answer all questions propounded except those which would incriminate her for the violation of a federal offense, and she says she won't answer any.

"The Court: Is that your position, madam?

"Mr. Menin (counsel for petitioner): I think there has been a misunderstanding.

"The Court: Just a minute. Will you please be seated, Mr. Menin? Please be seated.

"Mr. Menin: Well, I represent this lady.

"The Court: Just a moment. Please be seated.

"Mr. Menin: Very well.

"The Court: I'll hear you in due course (.) Madam, do you still persist in not answering these questions?

"Mrs. Rogers: Well, on the basis of Mr. Menin's statements this morning—

"The Court: Will you please answer the question yes or no?

"Mrs. Rogers: Well, I think that's rather undemocratic I'm a very honest person. Would you mind letting me consider—

"The Court: Make any statement you wish.

"Mrs. Rogers: Well, as I said before, I'm a very honest person and I'm not acquainted with the tricks of legal procedure, but I understand from the reading of these cases this morning that I am — and I do have a right to refuse to answer these questions, on the basis that they would tend to incriminate me, and you read it yourself, that I have a right to decide that.

"The Court: You have not the right to say.

"Mrs. Rogers: According to what you read, I do. I stand on that.

"The Court: All right. If you will make no changes, it is the judgment and sentence of the court you be confined to the custody of the Attorney General for four months. Call the next case." Transcript of Record, pp. 76-78 (September 23, 1948).

Does this action by the trial court indicate a proceeding according to the "law of the land"? Litigants speak through their

counsel and in this case when counsel attempted to speak for the petitioner the court ordered him to "be seated," and then stated he will hear him "in due course." Does the record disclose counsel was heard in "due course"? We submit the record discloses that counsel was ordered to be seated and was *never* given an opportunity to speak on behalf of his client before she was sentenced to jail. Rather it will be noted the trial court seemed to be desirous of *disposing* of the ladies, including this petitioner.

The Fifth Amendment provides among other things that "no person shall*** be deprived of life, *liberty* or property without due process of law.

In *Cooke vs United States* 267 U. S. 517 this court said:

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have reasonable opportunity to meet them by way of defense *or explanation*. We think this includes *the assistance of counsel*, if requested, and the right to call witness***".

We deem the words the right to "the assistance of counsel" means more than having a lawyer stand (or be seated) besides his client while judgment is pronounced. We think it means the right to have a member of the bar advocate the cause of the petitioner, to speak for her, to make explanations to the court for her conduct or actions and to submit to the court any and all other matters which may bear on the issues in defense or mitigations of her acts. In other words, the right to counsel includes the right of counsel to be permitted to exert every possible effort within legal means for the protection of his client against the onslaught of the prosecution in a criminal proceeding. Any attempt to deny to a litigant such right is inconsistent with the constitutional guaranty of due process of law.

In *Powell vs State of Alabama* 287 U. S. 45, 53 S.Ct. 55 at 64 this court said:

> "***If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to *hear a party by counsel* employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and therefore, of due process in the constitutional sense."

In the case of *Hovey vs Elliott* 167 U. S. 409, this court in quoting *Windsor vs McVeigh* at 414:

> "***A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

In Colorado where this case arose the Supreme Court here said in *Canon City vs Manning* 95 Pac. 537, 43 Colorado 144.

> "Whether one has been guilty of such violation of law as justifies ***the infliction of punishment can only be determined by a court of competent jurisdiction where accused is *offered an opportunity to be heard before judgment is pronounced against him*" (Italics ours).

And in *Wing vs United States* 218 U. S. 272:

> "Due process of law *affords a hearing before it condemns****."

A witness cited for contempt may not be punished without due process of law. *Cooke vs United States supra, Camarota vs United States* 111 Fed. 2d 243, see also 16 C. J. S. 1169.

Conclusion

We submit that in this case there was no voluntary election on the part of petitioner to waive the protection of the Fifth Amendment against self incrimination. An examination of the cases cited by the court in its majority opinion all indicate that before one can be compelled to make a full disclosure of the matters under investigation they must elect voluntary to waive the privilege, this of course, may be done by a voluntary admission of guilt or incriminating circumstance. In the case at bar the record does not disclose a situation where such is the case.

On the quesetion of due process we believe that the record discloses that petitioner was not accorded a hearing in which her counsel was permitted to submit to the court matters in her defense. The fact is the court seemed anxious to dispose of the (petitioner) ladies and certainly proceeded with dispatch to sentence her to jail without permitting her to be heard by counsel.

This tribunal has always extended its protection to the victims of oppressive measures by inferior courts which would flout the provisions of the Constitution. We hope and trust that this court will listen to our plea against this apparent denial by the trial court of so basic a right as the right to be heard by counsel before pronouncement of judgment.

The case should be reversed.

Respectfully submitted,

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Certificate of Counsel

I, SAMUEL D. MENIN, attorney for petitioner herein, do hereby certify that the above and foregoing Petition for Rehearing is presented in good faith, and not for the purpose of delay.

SAMUEL D. MENIN